

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM

April 10, 1905, to April 15, 1907.



Compiled and Edited by
FRANCIS X. BUSCH
Corporation Counsel

Published April 15, 1925.



Champlin Law Printing Company
General Law Printers
Chicago



PREFACE.

The following opinions have been compiled and published by the Hon. Francis X. Busch, appointed Corporation Counsel on April 15, 1923, by Hon. William E. Dever, Mayor. The opinions are the heretofore unpublished opinions of the latter part of the incumbency of Hon. Edgar B. Tolman, Corporation Counsel, and the opinions of Hon. James Hamilton Lewis, Corporation Counsel, the volume covering the period from April 10, 1905, to April 15, 1907.

The publication of this volume relieves a hiatus in the publications, so that all the opinions of the Corporation Counsel and their staff from January, 1872 (all record of former opinions having been destroyed by the Chicago fire), to the present time, are now available for the use of the bar and the public.

FRANCIS X. BUSCH.

**Statement by Hon. James Hamilton Lewis, Corpora-
tion Counsel from July 10, 1905 to
April 15, 1907.**

I am honored by the request of Honorable Francis X. Busch, present Corporation Counsel of the City of Chicago, to present a preface to that publication that shall contain the opinions of myself and my Department when I was Corporation Counsel of the City of Chicago.

First, let me express the appreciation that the bar feels to Mr. Busch for the compilation, and the indebtedness of the citizenship for placing these opinions where they are accessible to the citizen.

The service of Mr. Busch as Corporation Counsel, well entitles him to the praise of his fellow citizens, and to the expressed pride of his friends.

While I was Corporation Counsel of Chicago, under Hon. Edward F. Dunne, Mayor, there arose many distressing and embarrassing controversies to be met by the Law Department. The cases inherited involved:

(1) The liability of the City for damages occasioned by the riots which had transpired, resulting in great destruction to property;

(2) The liability of the City in the matter of condemnation in opening up streets which are now great thoroughfares of the City, particularly along the Lake front;

(3) The controversies over the franchises of the street railways, and that of the claimed privileges of the elevated railway, and then the controversies over the steam railroads in their efforts to elevate their tracks and take possession of certain streets.

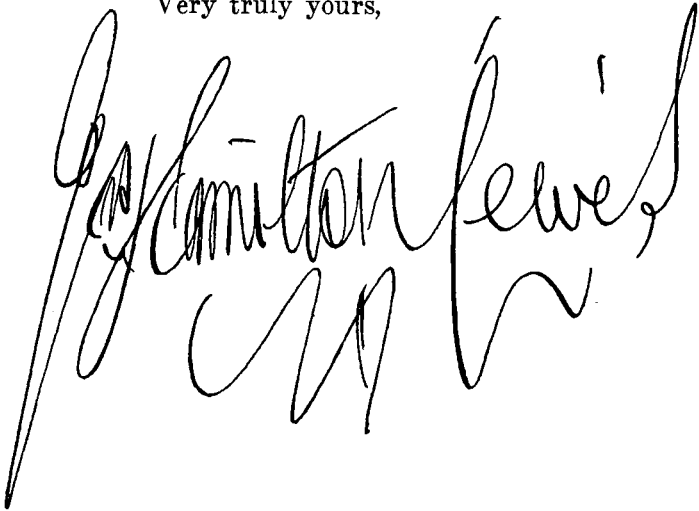
Many were the questions involving the legality of the bonds issued by the City, and matters of commerce respecting the obstruction of the river by tunnels built by street railways, and other forms of embarrassment to commerce.

Then the constitutionality of ordinances which were passed during the period preceding the Dunne administration and pending through it, with the often introduced controversies to be met before all the courts.

At this time came on the creation of the Municipal Court, wherein I participated in the preparation of the bill to create these courts,—the credit of which, however, must be given Judge Hiram T. Gilbert,—and in the arguments before the Supreme Court of the State, whatever may be my contribution, to Judge Gilbert again must go the greater credit.

However, I am pleased to dedicate this work of compiling the rulings to the uses of the citizen, to the profession of the law, and to congratulate myself that I am able to cooperate with Corporation Counsel Busch and his very efficient aid, Mr. Albert H. Veeder, Third Assistant Corporation Counsel, in the presenting of this volume.

Very truly yours,

A large, stylized handwritten signature in black ink. The signature appears to read "Hamilton Lewis" and is written in a cursive, flowing style. There are several loops and flourishes, particularly a large one at the beginning and another at the end. The ink is dark and the background is white.

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM
APRIL 10, 1905 TO APRIL 15, 1907.

Remodeling of La Salle Theater.

April 13, 1905.

GEORGE WILLIAMS, ESQ., Commissioner of Buildings.

Dear Sir:

I have your letter of the 1st inst. stating that Marshall & Fox have applied for a permit to remodel the La Salle Theater, 147 East Madison street, as an existing building. The letter states that the application of the architects is to "reconstruct the La Salle Theater to comply with the ordinances for the reconstruction of existing buildings of Class V. In order to make this possible the stage should be moved from the side to the rear of lot, fireproof passages carried under the stage for the main floor and across the stage for the balcony and gallery levels, and the usual passages at the rear of the auditorium connected with the present main foyer from Madison street, with separate entrance for gallery."

Your letter then states that this theater is now operating, and has been since it was reopened, as a Class IV building, and therefore there is some doubt in your mind whether your department can issue a permit for the reconstruction of the building, allowing them to comply with the Class V ordinance and reopen as a Class V building, and you ask to be informed whether it is necessary to hold them to the portion of the Class V. ordinance that relates to existing buildings, or to the portion that relates to new buildings.

While the building ordinance speaks of an "existing Class IV building" and an "existing Class V building," the word "existing" does not modify "Class IV" and "Class V," but modifies the word "building."

In my opinion, therefore, there is no legal objection to the issuance of a permit authorizing the remodeling of the La Salle Theater to make it comply with the requirements of that portion of the Class V ordinance which applies to "existing buildings."

Very truly yours,
WM. H. SEXTON,
Assistant Corporation Counsel.

Approved:
EDGAR B. TOLMAN,
Corporation Counsel.

Liability of City for Refund of License Fee for Unused Period.

April 19, 1905.

F. I. BENNETT, Esq., Chairman, Committee on Finance.

Dear Sir:

This department is in receipt of a communication from you requesting an opinion as to the liability of the City to refund certain amounts for the unused periods of saloon licenses under circumstances showing that the licensees were either unwilling or unable to continue their business for the full period covered by the license by reason of being burned out, change of location, change of ownership, revocation of license on account of insufficient petitions, etc.

All these cases, with the exception of one which I will take up later, present a state of facts which show that the applicant was prevented from continuing his business for the full license period by reason of some circumstance or act not arising from any action on the part of the City or of its officers or servants.

Where a licensee is prevented from enjoying the full license period, either by some act of his own or through unfortunate circumstances, such as fire, new and prohibitive legislation or other cause, the City is under no liability to refund him any portion of the license fee theretofore paid. It has been said in the case of *Traynor v. Multnomah*, 2 Oreg. 214, that the payment of a license fee is a condition precedent, not a deposit, and goes at once into the general fund.

In Black on Intoxicating Liquors, Section 188, the text writer cites numerous cases where the licensee, under a remonstrance, has paid an excessive amount for a license, or an amount, which, at the time he was not legally liable to pay, and the writer holds in all such cases that where the money was paid without the use of force, fraud, menace or intimidation on the part of the municipality or its officers or agents, then the payment is considered as being made voluntarily, and cannot be recovered.

In *Peyton v. Hot Spring Co.*, 53 Ark. 236, it was held that a license fee could not be recovered because on application of a majority of the inhabitants an order prohibiting the sale of liquor in territory covered by the license was made immediately after it was granted. On even stronger reasons a person who voluntarily pays the liquor license and is unwilling or unable to continue the business for the residue of the term covered by the license, is not entitled to recover back the amount for the unused portion of the license. The amount paid is a license fee for the *whole period* covered by the license, and I can find no authority which will authorize the payment back of such unused portion of the license fee to the original licensee.

The case of George Willy, one of those enumerated in your communication, presents slightly different features from the others in that his license was revoked by the Mayor November 10, 1904, leaving an unused portion of fifty-two days, for which he claims \$71.04. I find, however, legal precedent for determining that the license fee, even in this case, is not recoverable.

Curry v. Tawas Township, 81 Mich. 355.

In that case it was held that a person voluntarily paying a liquor tax and afterwards abandoning the business because he was unwilling or *unable* to furnish the required bond, cannot recover the amount of the tax so paid. Also, in *Tatum v. Town of Trenton*, 85 Ga. 468, it was held that money voluntarily paid the Board of Commissioners of a town for a license to sell liquor, which they had no authority to grant, cannot be recovered back. To the same effect is *Williams v. City Council*, 68 Ga. 816.

In the case of Willy, owing to an insufficient frontage petition, the City had no authority to grant Willy his license, and thus the case comes exactly under the rule laid down in the 85th Ga., *supra*.

In conclusion, I am of the opinion that the City is not liable for any of the amounts paid by the licensees for the unused periods of their licenses.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Title to Site Upon Which City Hall Stands.

April 25, 1905.

HONORABLE EDWARD F. DUNNE, Mayor of Chicago.

Dear Sir:

I have your verbal request of recent date for an opinion as to the title of the City of Chicago in the west half of block 39 in the original town of Chicago, upon which the City Hall Building stands.

The title of the City of Chicago to these premises has been settled by the Supreme Court of Illinois.

March 14, 1894, the County of Cook instituted proceedings to eject the City of Chicago from said premises, case

No. 127747, in the Circuit Court of Cook County. The City filed its bill in the Circuit Court to enjoin the prosecution of this suit for ejectment; the County filed a general demurrer to the bill, which was overruled and a decree entered by Judge Tuley. The County appealed to the Supreme Court. At the October term, 1895, the Supreme Court rendered an opinion reversing the case and remanding it to the Circuit Court with directions to dismiss the bill. (158 Ill. 524.) The court did not pass upon the main question, that is, the question of title, but held that as the City's defenses could be set up in the action at law, equity would not lie to restrain the prosecution of the ejectment proceedings.

In January, 1896, the ejectment proceedings were submitted to Judge Windes, a jury having been waived, and May 4, 1896, a judgment was entered for the defendant. The County appealed from this judgment to the Supreme Court of Illinois, and at the May term, 1897, the court rendered its opinion affirming the lower court. (*County of Cook v. City of Chicago*, 167 Ill. 109.)

The substance of the opinion of the Supreme Court was as follows:

The County of Cook brought its action of ejectment against the City of Chicago to recover the west half of block 39 in the original town of Chicago. Block 39 was, with other lands, donated to the State of Illinois by the United States for the purpose of aiding in the construction of the Illinois and Michigan Canal under and by virtue of an Act of Congress approved March 2, 1827. The title to the whole of said block vested in the County of Cook in fee on or about November 10, 1831, by deed of donation from the commissioners of the Illinois and Michigan Canal and by grant from the State of Illinois by patent, in conformity with the act of the Legislature of Illinois in force February 15, 1831. On the date at which the fee to block 39 vested in the County of Cook, to-wit, November 10, 1831, and prior thereto, the municipality of the City of Chicago was not in existence, as the City was not incorporated until 1837. In the act of the General Assembly of the State of Illinois in force January

15, 1831, creating the County of Cook, it was provided that the public buildings at Chicago should be erected on the public square as laid off by the canal commissioners, on the south side of the Chicago River. The original town of Chicago was laid out and platted by the canal commissioners, and block 39 was part of the premises so platted by them, and within the memory of the oldest inhabitant was the only part of the original town of Chicago known as the public square, and was marked "reserved" on the plat. Between November 10, 1831, and February 4, 1851, the County of Cook did not alien, convey or encumber block 39 or any part thereof.

February 4, 1851, the General Assembly of the State of Illinois, by an act entitled "An act to prevent the sale of the public square in the City of Chicago," dedicated block 39 to public use as a public common or square, and forbade the sale, mortgage, incumbrance or conveyance of the same, but permitted the location of county buildings thereon.

February 4, 1851, the date of the passage of said act, and prior thereto, the County of Cook was in sole and exclusive possession of the whole of block 39, and the occupancy of the west half by the City of Chicago commenced after said date. Negotiations were had between the City and County authorities for the purchase, use or occupation of said block by the City prior to February 4, 1851, but resulted in no contract or agreement or in any permanent occupancy of the block, or any part thereof by the City. The occupancy and use of the west half of block 39 by the City for its corporate purposes began solely under and by virtue of an agreement entered into between the corporate authorities of the City and of the County, at a date subsequent to February 4, 1851, and such occupancy and use by the City have since that time been continued solely by virtue of agreements between the corporate authorities of the City and County, *and the City now claims the right of possession* by virtue of an alleged agreement entered into by it and the corporate authorities of the County on or about August 19, 1872, wherein it was specified that all former arrangements between the City and County in reference to said block shall be merged

in the new agreement. Whatever action in relation to any transfer of said premises to the City, or the occupancy and use of the premises by the City for its corporate purposes, has been taken by the proper authorities of the City and County was solely upon their own motion and without reference to action by the people. Under certain of these agreements the City used certain portions of this block as early as 1837, and in 1853 a building was erected which was partly paid for by the County and partly by the City, and each used separate parts thereof. In 1860 the building was enlarged under an agreement between the City and County, and each used exclusively separate parts thereof.

All these acts, so far as shown by the evidence, were done without any definite agreement in writing other than a resolution of the Board of Supervisors of Cook County passed in 1868, which provided the City should be entitled to the west half of the then existing court house upon payment of \$50,000 by the City to the County. It was further provided the City should then have the privilege of erecting a building west of the court house. The proposition embraced in this resolution was accepted by a resolution adopted by the common council of the City. The City then erected a building on the west half of the block, expending \$400,000 for its construction, and entered into its exclusive use, with knowledge and consent of the Board of Commissioners of the County. This condition of occupancy and exclusive use of separate parts of the block continued until the buildings were destroyed on October 9, 1871. On October 12, 1871, the following resolutions were adopted by the City Council:

“RESOLVED, That this committee recommend that the common council, for the present, take possession of the court room of the Madison street police station for their meetings, and that the board of public works be required to immediately provide all the city officers and common council with temporary accommodations by erecting buildings on the old court house square.

“RESOLVED, That the board of public works be required to immediately prepare plans and specifications for a permanent building for all city officers and the common council, to be erected on the old court house

square, and report the same as soon as possible to this council, and to at once proceed to clear off said square."

Another resolution was passed at the same meeting as follows:

"RESOLVED, That the board of public works be directed to confer with the board of supervisors, or a committee of said board of supervisors, in regard to erecting a public building on the court house square, jointly with the county, for all public officers."

Other than above, no action had been taken by the City Council by which it had provided for sites upon which its public buildings of this character were to be erected, prior to October 20, 1871.

As a result of the calamity which befell the City the General Assembly was specially convened early after the 9th of October, and enacted a law by which the lien of the City of Chicago on the Illinois and Michigan Canal and its revenues was discharged by refunding to the City the amount it had expended in the construction of the canal, with interest thereon, and for this purpose an appropriation was made of \$2,955,340, to be paid from the State treasury. The proviso to Section 1 of that act is:

"That not less than one-fifth, nor to exceed one-third, of said sum so appropriated shall be received by said city, and be applied in reconstructing the bridges and public buildings and structures destroyed by fire, upon the original sites thereof, as already provided by the common council."

An emergency clause was appended, because by a "great conflagration in the City of Chicago the buildings, bridges and other public improvements have been totally destroyed," etc. The act was approved and in force October 20, 1871.

Subsequently, on August 5, 1872, an agreement was made between the City and County, the substantial provisions of which were:

"The said parties will join in the erection of a public building on said block 39 for the use of the county and city governments, respectively, and the courts of record of said county. The general exterior design of

said buildings shall be of an uniform character and appearance, as may hereafter be agreed upon by the board of commissioners and the common council of the City of Chicago. *The portion of said buildings situated west of the north and south center lines of said block shall be erected by the City of Chicago at its own expense. The City of Chicago shall occupy that portion of said block west of said center line for a city hall and offices incidental to the administration of the city government, and for no other purpose whatsoever, except as herein-after provided.* Each of the parties hereto will heat, light and otherwise maintain and furnish its own portions of said building. The necessary expenses of improving the grounds around said building, and maintaining the same, shall be paid annually by the said city and county. *The said agreement shall contain a covenant on the part of the county that said City of Chicago shall have the control of and occupancy of the said west half of said block for the said city hall and public offices incidental to the government of said city without hindrance, henceforth forever."*

Under this contract a building was erected and there was expended therefor the sum of \$1,716,000, each party thereto paying its respective part, and each entering into possession and having exclusive control, the City of the west half and the County of the east half of said block.

The foregoing statement embodies the acts of the parties to the litigation and legislature having reference thereto.

The court said, beginning at page 117:

"The rights of the parties to this litigation rest on the construction to be given the Act of 1831, the Act of 1851, the Act of 1871, and the acts of the parties hereto. By the Act of Congress of March 2, 1827, the block in controversy with other lands, was donated to the State of Illinois, subject to the disposal of the Legislature, to aid in opening a canal to unite the waters of the Illinois river with those of Lake Michigan. By that act the State was authorized to sell and convey the lands so donated in fee. With the title to these lands so vested in the State, with power to sell and convey, the Legislature enacted the Act of January 15, 1831. This act provided, among other things, for the establishment of the County of Cook, with Chicago as the county seat. Sections 10 and 11 of that act are as follows:

“ ‘Sec. 10. The public buildings at Chicago shall be erected on the public square as laid off by the canal commissioners on the south side of the Chicago river, and on the public square laid off at Ottawa on the north side of the Illinois river.

“ ‘Sec. 11. If the canal commissioners shall make any donations of lots for the erection of public buildings at Ottawa or Chicago to the county commissioners of said counties, it shall be the duty of the county commissioners’ court of each of said counties to sell the same whenever they may think it best, and apply the proceeds thereof to the erection of a court house and jail at said county seats, respectively.’

“ ‘The block in question on the plat of the town of Chicago, as made by the canal commissioners, was marked ‘reserved.’ But this plat was not made until 1837. It is apparent from the evidence that a plat existed prior thereto, as, from the patent issued by the Governor on November 10, 1831, the title to lots 1, 2, 3, 4, 5, 6, 7 and 8, block 39, with other lands, was vested in the county commissioners of Cook County on November 10, 1831. The evidence shows that prior to 1837, when the canal commissioners’ plat was made, this block was known as and called the public square. The patent issued by the Governor under the Act of Congress of 1827, and the Act of the Legislature of this State of 1831, were for a specific purpose.

“ ‘The Act of 1831 was before this court and was construed in *Lyman v. Gedney*, 114 Ill. 388, where, with reference to the Act of 1831, after quoting Section 11 above, it was held in reference to a public square claimed to exist in Ottawa (p. 402): ‘Instead, then, of there being a donation of this block for a public square, the lots into which it is divided are donated to be sold to raise money with which to build a court house and jail. True, it is commanded that the public buildings shall be on the square as laid off, etc., and, we may admit, on this square; but it is not commanded the whole block shall be devoted to that purpose, and, construing the different sections together and giving practical effect to both provisions, the commissioners were required to use what they should deem necessary for the public buildings, and sell and convey the residue in order to realize money to erect these buildings. If any trust was created it is by virtue of the section referred to authorizing the canal commissioners to make donation of the property, and

the patent of the Governor pursuant thereto vesting title in the county commissioners. But this, as is thus seen, was only to aid in the erection of the buildings.' Whilst this was held with reference to the City of Ottawa, yet it was under the Act of 1831. In the same case it is further held: 'That property which is conveyed to aid in the erection of public buildings is intended to be sold and converted into money would be self-evident.'

"In the *Lyman* case the patent was issued for the lots which constituted block 11 in the town of Ottawa, and that block was marked on the plat 'Public Square,' and it was held, under Section 10 of the above statute, that the public buildings were to be placed on that lot. Yet that section did not require the whole lot should be used. In this case, that the public buildings in Chicago should be placed on this lot does not require that the whole lot should be so used. *Lyman v. Gedney* is conclusive on this question.

"Without entering into the discussion of the power of the Legislature under Section 17 of Article 13 of the Constitution of 1848, which provides that 'no * * * law impairing the obligation of contracts shall * * * be made,' and without discussing whether the Act of 1851 violates that provision, it is sufficient for our purpose here to waive those questions and concede that act in force. It may be conceded that its effect is to restrain the board of supervisors from encumbering, aliening or conveying block 39. The subsequent arrangements, by which, in 1868 and long prior thereto, the City was in possession and occupancy of the west half of that block, and in the latter year expended \$400,000 for the construction of its city hall, on the east half of which block the court house stood, both of which buildings were destroyed in October, 1871, still necessitate a consideration of the effect of the Act of October 20, 1871, on the Act of February 4, 1851.

"In 1871, and long prior thereto, the City was in possession of the west half of this block, and of its city hall built thereon, which being destroyed, the City Council, on October 12, 1871, adopted the resolution requiring the board of public works to prepare plans and specifications for a permanent building for all City officers and the common council to be erected on the old court house square, the half block in question. With this resolution as substantially the only act of the Council in this behalf, the Act of October 20, 1871, was passed, which made an

appropriation of \$2,955,340, to be paid from the State treasury to the City, and the proviso to which act required that not less than one-fifth nor to exceed one-third of that sum should be expended in reconstructing the bridges and public buildings and structures upon the original sites thereof, as already provided by the common council. The original site of the building occupied by the City Council was the west half of this block, the site referred to by the resolution was the same, and the Act of 1871 had reference to the same. The only construction to be given this act is, that it was required of the City that a certain part of this appropriation should be expended for the erection of buildings for its use on this block. This requirement was a recognition of the right to use the same. A recognition of that right was, in effect, a repeal of the Act of 1851. If the Act of 1851 prohibited the City from using this lot, the Act of 1871 required it to do so. There is such repugnancy between the two acts that the latter is, by implication, a repeal of the former as to the west half of block 39, and after its passage the county had a right to convey to the City that part of that block.

“August 28, 1872, the board of commissioners of Cook County and the City entered into a contract, by which it was agreed, among other things, that all former arrangements between the City and County as to the use of said block 39 should be merged into a new agreement, by which the City and County agreed to join in the erection of a public building of uniform character on said block, for the use of the County and City governments and the courts of the County, the City to occupy the west half of the block for a city hall and offices incidental to the administration of the City government, and for no other purpose, except for use, under certain contingencies, by the Supreme Court of the State. The City was to pay the expense of a building for such purposes, to be erected on the west half of said block, the County agreeing to build on the east half a building for a court house. It was agreed that the City ‘should have the control and occupancy of the said west half of the block for the uses aforesaid without hindrance, henceforth and forever,’ with the further provision, however, that if the City should cease so to use the same the County should have the right to resume possession, and in such case the City should forfeit all its rights therein and the contract should be void. For the rights given under this

agreement the City released a debt due to it from the County of about \$30,000, and conveyed to the county what were known as the 'hospital lot' and the 'criminal court block,' both being very valuable pieces of real estate in the City. Soon after this contract was made the City and County authorities proceeded to erect the building or buildings now on this block, and under the provisions of this contract the west half of the building was constructed by the City at a cost of \$1,716,000. The effect of the Act of 1871 was to authorize that contract. By it the right to use the west half of this lot by the City forever was given. No right of recovery exists on the part of the County against the City.

"The judgment of the Circuit Court is affirmed."

Under this decision, therefore, the City has the right to use the west half of block 39 of the original town of Chicago for a City Hall and offices incidental to the administration of the City government and for no other purpose, except for use under certain contingencies by the Supreme Court of the State, forever, with the provision, however, that if the City should cease so to use the same the County of Cook has the right to resume possession, and in such case the City shall forfeit all its rights therein and the contract of August 28, 1872, between the City and County shall be void.

If, therefore, the City desires to construct a new public building on other premises it can terminate said contract by so doing, whether for a consideration or otherwise, and the County would then have the legal right to resume possession of the west half of block 39.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

Claim for Violation of Contract for Maintenance of Reduction Plant.

April 26, 1905.

HON. F. I. BENNETT, Chairman Committee on Finance.

Dear Sir:

I have your communication of recent date transmitting to this department the petition of McDonnell & Brennan for the payment of a claim for nine hundred and sixty-six dollars (\$966), alleged to be due them on account of the City's non-enforcement of the contract under which they are maintaining a night soil reduction plant at 35th street and Kedzie avenue in this City.

The clause of the contract under which the controversy arises is as follows:

"Fifth. It is further provided as a condition hereof, in consideration of the mutual rights and obligations herein and hereby granted and assumed, that all licensed city night scavengers shall, under the rules and regulations of the Department of Health and the city ordinances relating thereto, now existing or which may hereafter be adopted or ordained, be entitled and required to have all night soil removed by them in the course of their business, reduced in said plant upon payment to the lessees of a reasonable compensation therefor, not exceeding four and one-half ($4\frac{1}{2}$) cents per cubic foot of night soil reduced."

This contract was entered into in pursuance of the authority granted under an ordinance of July 13, 1903 (Council Proceedings 1903-4, p. 800), section 3 of of which provides as follows:

"Section 3. Said lease shall further provide that all licensed city night scavengers shall be entitled and required to have the night soil reduced in said plant upon payment to the lessee of a reasonable compensation therefor, not to exceed four and one-half cents per cubic foot of night soil reduced. And the said lessee shall pay to the City Comptroller, in addition to the rental heretofore required, ten per cent of the gross re-

ceipts derived from the operation and maintenance of said plant. Said payments shall be made every three months, beginning three months from the date of said lease."

It consequently appears that under the terms of the ordinance and the contract entered into thereunder, the City assumes the obligation of compelling under its police power, all licensed City night scavengers to have all night soil removed by them in the course of their business, reduced in the plant of McDonnell & Brennan, upon the payment to the lessees of a reasonable compensation—not to exceed four and one-half cents per cubic foot.

I am of the opinion that under this contract the City has made an engagement and assumed an obligation which is valid and binding upon it, and which it must perform to the best of its ability.

Certain correspondence between the claimants and the Commissioner of Health is before me, copies of which I attach hereto, showing numerous violations of the provisions of the contract which were called to the attention of the Department of Health.

It thus appears that the City was notified, through its officers, of the continuing violations of the contract existing between it and McDonnell & Brennan, and although notice was directly brought home to it, did not require that these violations cease. It may be that under the terms of the ordinance it is very difficult to prevent night scavengers from depositing the contents of their wagons at other places than the reduction plant which the ordinance specifies shall be the sole place within the City limits where such matter shall be deposited. However, this is not a question for present consideration, and I am of the opinion that should you consider the facts placed before you sufficient evidence of a diversion of night soil by scavengers from the reduction plant of McDonnell & Brennan, and should you further consider that the City was notified of such diversion, then, in my judgment under such a state of facts the City is liable to

these claimants for the amount of money which they may be able to prove they have lost by reason of such diversion.

I attach hereto a copy of a communication this day transmitted to the Committee on License concerning this matter, and shall attach to said communication a copy hereof.

Very respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Right of City to Inspect Elevator Erected by Federal Government and Charge Fee for Such Inspection.

May 12, 1905.

GEORGE WILLIAMS, ESQ., Commissioner of Buildings.

Dear Sir:

Replying to your inquiry of April 14th, asking whether you have the right to inspect the elevator erected by the federal government under the sidewalk on the Dearborn street side of the post office, and to charge a fee for same, I beg to say that while the State of Illinois has ceded to the United States exclusive legislative jurisdiction over the block of ground used by the post office, it has not ceded such jurisdiction over any part of the space on, above or beneath the public highways abutting this block. The federal government has acquired no interest in the land outside of the lot line; and if a permit to do this work is not procured from the City, it is a trespasser.

I am of the opinion, therefore, that without the City's consent, it is illegal for the federal government to maintain this elevator at this point, and that you have a right to inspect it so long as it remains there.

As to your right to charge the usual fee for such inspection, I am of the opinion that the federal government

occupies practically the same position in this matter that any citizen does, in which case it is obliged to pay the fees.

I suggest that, in the absence of a permit, you enter a protest against the placing of an elevator at this point and state in such protest that if the authorities persist in maintaining this elevator it must be subject to the ordinances of the City concerning inspections and fees.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Asst. Corporation Counsel.

Chicago Public Library Elevators—Right of City to Inspect and Charge Fee Therefor.

May 15, 1905.

C. C. H. FYFE, Esq., Special Committee, Library Board.

Dear Sir:

Replying to your inquiry of February 6th, as to whether or not The Chicago Public Library is obliged to pay a fee to the City for the inspection of the elevators in the Library building, I beg to say that the building ordinance makes it the duty of the elevator inspectors to inspect all elevators "used and operated in any building in the City of Chicago"; and when the same is found in a perfectly safe condition the Building Commissioner is required to issue a certificate to that effect. (Secs. 29 and 31.)

Section 30 of the ordinance, providing for the collection of the fee, is as follows:

"The owners, agents or occupants of all buildings, in which elevators are used shall pay the Commissioner of Buildings, before a certificate of inspection is issued to him, a fee of two dollars (\$2.00) for each

inspection of each elevator made in pursuance of this ordinance."

I note your suggestion that the building belongs to and is used exclusively by the city. While it is true that this is a building supported by taxation, it is not supported by the city tax, and the Commissioner of Buildings has no power to remit such a fee, except upon an order by the City Council. In the absence of such an order, I am of the opinion that you should pay this fee.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Asst. Corporation Counsel.

Dram-Shop License—Frontage Consents.

May 16, 1905.

HONORABLE EDWARD M. LAHIFF, City Collector.

Dear Sir:

There has been referred to this department for an opinion the protests of certain property owners upon 51st street, between Indiana and Prairie avenues in this city against the issuing of a dram-shop license to P. J. O'Hare, who is now conducting a dram-shop at the northwest corner of 51st street and Prairie avenue. There have also been furnished by the Hyde Park Protective Association, through its secretary, a certified plat of survey showing the location of the dram-shop; also a photograph of the premises in question. The applicant has furnished this department with suggestions in opposition to the protest, all of which documents I attach hereto.

The case of O'Hare is not a new one to this department. On April 10th, of this year the Corporation Counsel, in an opinion to Mr. Farwell, Secretary of the Hyde

Park Protective Association, held that at that time no action could be taken by the then Mayor on account of injunction and mandamus writs protecting the present license, and further said

“But in each of these cases (those of O’Hare and Blomberg) protests have been issued by one-quarter of the owners of frontage, and this department has advised the City Collector’s office that no new licenses can be issued at the end of the present term without new frontage consents.”

Upon the same date Mr. Rothmann advised you that

“The renewal of the license of P. J. O’Hare is protested against by Kate T. Peck and Hellen T. Cheney, each of whom claims to own 81 feet of frontage on 51st street, between Indiana and Prairie avenues, that being the block in which the saloon of said O’Hare is located. The 162 feet in question, it is claimed, amounts to more than one-quarter of the frontage of 51st street, between Indiana and Prairie avenues, and if this is true it will be necessary for O’Hare to present a new petition containing the signatures of the owners of a majority of the frontage on both sides of the street on all four sides of the block in which the saloon is located before a new license can be issued to him. Mr. Farwell states he will furnish you the certificate of survey, showing that the 162 feet in question are more than one-quarter of the frontage * * * In accordance with the provisions of the ordinance quoted (Sec. 1 of an ordinance of the Village of Hyde Park, adopted April 4, 1889) the Police Department should be directed to notify the two parties named that these protests have been filed.”

From the certified plat before me the following facts appear:

On the north side of 51st street from the east line of Indiana avenue to the west line of Prairie avenue the distance, less the 18 ft. public alley, is 324 ft.

On the south side of the same street, between the same cross streets, the distance, less the 20 ft. public alley, is 322.15 ft.

The total distance on both sides of 51st street, between the above named cross streets, less the public alleys, is 646.15

ft., of which one-quarter is 161.53 ft. The amount of property signed for in protest against the renewal of the dram-shop license is 162 ft., or a fraction of a foot in excess of a majority of frontage feet on both sides of 51st street, between Indiana and Prairie avenues. The number of persons owning property on both sides of this street, between the cross streets, is 6, to-wit:

Kate T. Peck
 Hellen T. Cheney
 Daniel Duffy
 Geo. P. Everhart
 Michael McDermott and
 Harry L. Erwin

It thus appears that the protest is signed by a third of the property owners upon both sides of the street in question.

There is some question raised by said licensee O'Hare as to the correctness of the survey in regard to the 20 ft. public alley on the south side of 51st street, it being claimed, I understand, by him that the east 10 ft. of said alley is not properly a part thereof, but should be added to the frontage owned by Everhart and McDermott, which addition would increase said frontage so owned to 192.45 ft. This claim, however, is not substantiated by any evidence and for the purposes of this opinion I assume that the plat submitted is correct in respect to the width of this alley, as well as in other respects.

The ordinance of the Village of Hyde Park adopted April 4, 1889, is published at Section 2085 of the revised code of Chicago of 1897, and is as follows:

"Section 1. Any person who shall desire to obtain a license to keep a saloon or dram-shop shall, in addition to the requirements now provided by ordinance, present his application in writing to the Village Comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dram-shop is to be kept, which application shall be signed by a majority of the property owners, according to front-

age, on both sides of the street in the block in which such dram-shop is to be kept and shall also be signed by a majority of the bona fide householders and persons or firms living in, or doing business on each side of the street in the block upon which such dram-shop shall have its main entrance; Provided, however, that any person or firm who shall have made application as aforesaid, and received a license to keep a dram-shop shall not be required to present an application as above, in order to obtain a renewal of the license, to himself or firm unless at least one-quarter (1-4) of the property owners or bona fide householders, persons and firms doing business upon both sides of the street in the block upon which the said dram-shop has its main entrance, shall file with the Village Comptroller at least thirty (30) days prior to the time for the renewal of such license, a notice stating that the signers thereof object to the granting or renewing of the license to said person or firm. Upon receiving such notice the Village Comptroller shall notify the Captain of Police that such notice has been filed and the Captain of Police shall at once notify, or cause to be notified the holder or holders of the license; but a failure to give such notification shall not be construed as a waiver of the necessity for filing the application as provided above."

It will be noted that under the provisions of this ordinance a saloon keeper once having obtained a license under a valid petition containing the requisite amount of frontage consents, may have his license renewed every year without presenting a new petition, unless a protest is lodged against such renewal by the owners of one-quarter (1-4) of the property or by one-quarter (1-4) of the bona fide householders, persons and firms doing business on both sides of the street in the block upon which the dram-shop or saloon has its main entrance.

The question narrows itself down to the interpretation which shall be given to the words "a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which such dram-shop shall have its main entrance."

There is no serious contention raised by the applicant that this dram-shop has its main entrance on any other

street than 51st street, nor could such a contention be seriously considered after a glance at the photograph attached hereto. In the original application for his license the applicant evidently considered that the dram-shop had its main entrance on 51st street, as an investigation of the files in your office shows that he presented with his application the signatures of a majority of the bona fide householders and persons or firms living in or doing business on each side of 51st street between Indiana and Prairie avenues. I am inclined to think that taking the words in their plain and ordinary meaning, the construction to be put upon this section of the ordinance is that the applicant in this case cannot obtain a renewal of his license without a new petition, provided a protest is filed against such renewal signed by one-quarter (1-4) of the property owners upon both sides of 51st street between Prairie and Indiana avenues. I find support in this view in the decision in the case of *Patterson v. Johnson*, 214 Ill. 481. In that case the ordinance requiring frontage consents for the erection and maintenance of a blacksmith shop was construed, and the previous definition of the word "block" in the *Harrison* case, *supra*, was qualified to some extent. The court held that the words "provided that in determining whether two-thirds (2-3) of the buildings on both sides of the street are used exclusively for residence purposes any building *fronting* upon another street and located upon a corner lot shall not be considered" limited the meaning of the word "block" in the ordinance under consideration to such an extent as to give that term the meaning of a street between the nearest parallel cross streets.

Another consideration has great weight with me in forming my opinion, namely: the fact that for years the executive officers of the City in charge of the License Department have considered this section of the ordinance as requiring an applicant to have upon his petition the names of a majority of bona fide householders and persons or firms living in and doing business on each side of the street in the block upon which the dram-shop fronts, and not the sig-

natures of such persons on the surrounding streets in the block. Practical construction of this sort cannot be overlooked, and any decision overturning this long established rule of the department would invalidate every saloon license in the Hyde Park district.

For the reasons given I consider that the protest lodged against the dram-shop keeper in the present case is sufficient, and that he must obtain a new petition to keep a dram-shop.

Yours very truly,
JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,
Corporation Counsel.

Construction of Dram-Shop License Ordinance.

May 19, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

I transmitted to you this morning a copy of an opinion in regard to the application of one P. J. O'Hare for a renewal of his dram-shop license. Since transmitting said opinion I have received a copy of a letter addressed to you, in which said applicant states that the principal entrance of his dram-shop is diagonally across the S. W. corner of his dram-shop, and that therefore, under the decision of this department in the *Blomberg* case, the Hyde Park dram-shop ordinance requires the protest of one-fourth of the property owners on both 51st street and Prairie avenue.

The communication addressed to your Honor does not state the fact, but it is material that you should know, that until last night the principal entrance of this dram-shop was on 51st street, and that after the rendition of our opinion holding the protest to be sufficient, for the purpose

of meeting said opinion the entrance of the dram-shop was changed and the corner of the building entirely reconstructed so as to replace with a diagonal entrance on both streets the entrance formerly on 51st street only.

The legal question presented, therefore, is whether or not such change of construction at this late day is effective to alter the rights of the parties. The original dram-shop license expired on April 30, 1905. The new license should have been issued on May 1st. On May 1st the legal status was as follows: A sufficient protest was then on file to cast upon the applicant the burden of securing a consent petition of a majority of the property owners on both sides of the four streets bounding the block in which his dram-shop was kept and a majority of the residents and business men on the streets where the principal entrance to said dram-shop was located. I am inclined to the opinion that this question must be determined by the legal status of the parties on the date when the law required the application to be acted upon, and that new rights cannot be obtained by ingenious devices employed for the purpose of escaping from the requirements of the law.

I am therefore of the opinion that the renewal license cannot be issued to this applicant without the consent petition above referred to.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

Power of City Council to Remit a Fine Before Right of Appeal Expires—Mayor May Release Prisoners, But Has No Power to Remit Fines.

May 23, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

In answer to your inquiry as to whether or not you have the power to remit a fine imposed by a police magis-

trate for the infraction of a City Ordinance, after the fine has been paid, I beg leave to say:

In the case of *City of Lewiston v. Hummel*, 38 Ill. App. 326, it was decided that the City Council had power to legally remit a fine before the right of appeal had expired. The whole logic of the case rests upon the proposition that only while the matter was pending and undetermined and the right of appeal existed the fine might be remitted.

Moreover, it has been decided that the Mayor's power is only to release persons imprisoned and that he has no power to remit fines. (*City of Newton v. Bergbower*, 63 Ill. App. 202.) It seems, therefore, that however meritorious the plea presented to you for clemency, neither you nor the Council can act thereon.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

Application of Chicago City Railway Company to Put in New Rails.

May 31, 1905.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

Answering your letter of May 29th, transmitting to this department applications of M. B. Starring, General Manager for the Chicago City Railway Company, for putting in new rails at places on Wentworth avenue and Clark street specified in said applications, I beg leave to say:

The ordinance governing that part of Wentworth avenue between 22d and 39th streets expires on July 6, 1916. There is therefore no objection to the issuance of a permit, in the usual form, for the first four items in the Wentworth avenue application.

That part of Wentworth avenue from 39th street south to 63d street is covered by an ordinance of the Town of

Lake dated September 10, 1884, and at the date of its passage no municipality could make a street railway grant good for more than 20 years. Said ordinance has therefore expired, and the permit for the last items in said Wentworth avenue application should contain the following provision:

"This permit is given by the City of Chicago, without prejudice to its claims that the rights of the Chicago City Railway Company in Wentworth avenue between 39th and 63d streets have expired and terminated, and nothing contained in this permit nor any of the work done under the authority hereof shall in any way be to the prejudice of the City of Chicago nor in any way affect the relative rights of the City and the railway company in any of the matters in controversy between them."

With regard to the application for permits to put in new rails on the Clark street line at sundry places between Madison and 19th streets, specified in the application of M. B. Starring above referred to, a controversy exists as to whether or not the ordinances in reference to the Clark street line have expired or were extended by the so-called "ninety-nine year act." You will therefore make a separate permit for the laying of new rails on Clark street, specifying the places at which the rails may be laid and inserting also the following clause:

"This permit is issued without prejudice to the claim of the City of Chicago that the ordinances authorizing the construction and operation of a street railway on Clark street have expired and terminated, and nothing contained in this permit nor any of the work done under the authority hereof shall in any way be to the prejudice of the City of Chicago nor in any way affect the relative rights of the City and the railway company in any of the matters in controversy between them."

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

**Applications for Permits by South Side Elevated R. R.
Co., Englewood Elevated R. R. Co.**

June 2, 1905.

JOSEPH M. PATTERSON, ESQ., Commissioner of Public Works.

Dear Sir:

I am in receipt of your communication of recent date requesting the opinion of this department as to whether you may properly issue permits to the South Side Elevated Railroad Company and the Englewood Elevated Railroad Company to install the following construction:

(a) To the South Side Elevated Railroad Company: To maintain and operate an additional track adjacent to and in connection with its present double tracks from 12th street to 43rd street; to straighten and change the location of certain curves; to make other improvements in its existing railroad, including the reconstruction of its stations and the hanging of the same from girders, with necessary stairs, stairways and platforms—more particularly the reconstruction of stations at 35th street and at 39th street and Indiana avenue;

(b) To the Englewood Elevated Railroad Company: To construct a station on its right of way on the east side of State street.

Considering first the application of the South Side Elevated Railroad Company to construct, maintain and operate an additional elevated track adjacent to and in connection with its present double tracks from 12th street to 43rd street. Authority to lay this track is found in an ordinance of March 16, 1903, (Council Proceedings 1903-4, p. 2716). This portion of the ordinance provides, so far as material to be quoted, as follows:

“Upon and in accordance with the petition and consents of the owners of the lands representing more than half of the frontage upon the north and south alleys and the courts and public places in the line of said north and south alleys, adjacent to the present right

of way and tracks of the South Side Elevated Railroad Company, and of each mile and fractional part of a mile of said alleys, courts and public places hereinafter authorized to be used, permission and authority are hereby granted to the South Side Elevated Railroad Company, its successors and assigns, to construct, maintain and operate for a term of years beginning with the passage hereof and expiring on March 26, A. D. 1938, an additional elevated railroad track adjacent to and in connection with its present double tracks, from a point on the north line of Twelfth (12th) street in the City of Chicago, Illinois, southward to a point one hundred and fifty-nine (159) feet north of the north line of Fortieth (40th) street, running thence southeastward with such curves as may be convenient or necessary, over and across Fortieth (40th) street, thence eastward to a point about two hundred and forty-eight (248) feet west of the west line of the north and south alley between Prairie and Calumet avenues in said City, thence turning south with such curves as may be convenient or necessary and running to a point about one hundred and ninety-five (195) feet north of the north line of Forty-third (43d) street, crossing all intersecting streets, avenues and alleys and public places. Said additional railroad tracks from said point of commencement to the north line of Fortieth (40th) street and from the south line of Fortieth (40th) street to said point one hundred and ninety-five (195) feet north of the north line of Forty-third street, shall be located upon, over and along said north and south alleys, courts and public places adjacent to the present double tracks of said railroad company, except where there are no north and south alleys, courts and public places or where said company shall elect to use right of way acquired or to be acquired by it by purchase, lease, contract or condemnation, and except between the following points, viz: A point about one hundred and twenty-three and seventy-five one hundredths (123 75-100) feet south of the south line of Twenty-eighth (28th) street, and a point about 364 feet north of the north line of Thirtieth (30th) street, and shall be located upon, over and along the right of way acquired or to be acquired by said South Side Elevated Railroad Company, by lease, purchase, condemnation or otherwise, where there are no north and south alleys, courts or public places adjacent to said present tracks of said company, or

where said company elects to use right of way acquired or to be acquired by it by condemnation or otherwise; said additional track south of Fortieth (40th) street running eastward to said alley between Prairie and Calumet avenues to be also located on right of way acquired or to be acquired by said company by lease, contract, condemnation or otherwise."

The authority to straighten and change the location of certain curves, to do which is requested of you, is found in the same ordinance, on page 2717. It is provided:

"The curve in the present tracks of said Company at and near Twelfth (12th) street shall be straightened, and the present structure of said Company at Fortieth (40th) street and at said alley between Prairie and Calumet avenues may be relocated with such curves as may be convenient or useful in the operation of the road, and consent is given hereby for the condemnation of such lands as may be necessary or convenient in so straightening said curve at Twelfth (12th) street and relocating and changing said curves at Fortieth (40th) street and at said alley."

I think you may therefore grant permission to this company to straighten the curves in their present tracks at or near 12th street, at 40th street, and at an alley between Prairie and Calumet avenues.

With regard to making "necessary improvements in its existing railroad, including the reconstruction of stations and the hanging of the same from girders, with all necessary stairs, stairways and platforms necessary and convenient for the accommodation of its passengers," authority for the same is given by the terms of the same ordinance, page 2717; but with the provision that none of the construction so allowed shall unnecessarily impair the use of the streets. If you find, therefore, that such construction will not unnecessarily impair the use of the streets, I am of the opinion that you may grant a permit therefor. It should be understood that in granting any and all permits to this railroad company, a provision should be inserted in the permit that the granting of the permits shall not be considered as a waiver on the part of the City of any of the claims or

contentions advanced by the City in any of the litigation now pending between the City on the one hand and any of the elevated railroad companies on the other.

Considering next the application of the Englewood Elevated Railroad Company for a permit to construct a station on its right of way on the east side of State street, in accordance, with plans therewith submitted.

Under the ordinance above referred to, permission is granted "to construct and maintain such stairs, stairways and platforms in adjacent streets and alleys as may be necessary or convenient for the accommodation of its passengers; provided the same do not unnecessarily impair the use of such streets and alleys."

The station, as shown by the map, is upon private property, and permission is now only asked for the platforms and stairways to connect said station with the tracks in such a way as to afford ingress and egress for passengers using the trains. The permit for the station building, as I understand it, is now being applied for from the Building Commissioner, and I think you have authority to issue a permit under this ordinance for necessary and convenient stairways and platforms, provided you find that the same do not unnecessarily impair the usefulness of any streets or alleys.

There should also be inserted in this permit a reservation of any claims of the City in pending litigation, such as I have above suggested.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

Affidavits of Banks in Contracts for Payment of Interest on Daily Balances.

June 12, 1905.

HON. ERNST HUMMEL, City Treasurer.

Dear Sir:

In regard to the affidavit furnished by the banks in the matter of the contract for the payment of interest on your daily balances, we beg leave to say:

We called on several of the persons who signed said affidavit for said banks, and nearly all of them appear to have made this affidavit on information and belief, and nearly all of them state that they know personally nothing in regard to the matters therein contained. Upon reporting this fact to the Finance Committee we were instructed to notify you to furnish us with affidavits signed by persons who actually knew what the contents were and to make the affidavit contain a clause to that effect.

We have also made two other slight changes in the phraseology of the affidavit so as to make it perfectly clear that it states all of the facts. For example, the affidavit furnished us says:

“Said bank has not given said Ernst Hummel any other valuable consideration of any kind or nature whatsoever on account of said balances.”

We have changed this clause so that it reads:

“Said bank has not given or agreed to give said Ernst Hummel any other valuable consideration of any kind or nature whatsoever on account of said balances.”

The affidavit, speaking of the one and one-half per cent, says that it has been “paid to F. M. Blount, trustee for all the banks interested, for the following purposes.” These last quoted words should read: “for the following and no other purposes.”

We have inserted at the end of the form of affidavit which you furnished us, the following clause:

“Affiant further states that he has personal knowledge of the matters and things herein stated.”

We enclose herewith eleven copies of form of affidavit in accordance with the foregoing letter.

Please have these affidavits signed and presented to the undersigned at your earliest convenience, so that the matter may be taken up at the next meeting of the Finance Committee.

Very respectfully,
EDGAR B. TOLMAN,
Corporation Counsel.

Application for Permit to Construct New Elevated Track.

June 13, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.
Dear Sir:

I am in receipt of your communication of the 10th inst. requesting the opinion of this department as to whether the South Side Elevated Railroad Company is entitled to a permit for the construction of a double track elevated switch from its main line at a point about 185 feet north of 63rd street, diagonally across the alley adjoining its main tracks to its own lands west of said alley; thence southward across 63rd street to its own lands immediately south of 63rd street, as shown and indicated by a blue print accompanying your communication.

This construction is new and not merely a readjustment of a former track. The rights of this Company are granted under an ordinance of March 26, 1888, and amendatory ordinances of April 2, 1891, and April 7, 1892. (Vol. 2 Special Ordinances, pages 953-960 and 963.)

According to the terms of these ordinances upon the original construction of the road plans were to be approved by the Commissioner of Public Works, showing what con-

struction was to be made before a permit would be issued. This department has held without exception that where such a condition precedent was required that the power to make further construction was exhausted and must be sought through a new grant from the City Council.

I am, therefore, of the opinion that you are without power to issue the permit applied for.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Gift of Fountain to the City.

June 16, 1905.

Hon. Edgar B. Tolman, Corporation Counsel.

Dear Sir:

In reference to the communication of Tracy C. Drake which was handed to me for investigation, I beg leave to submit the following report:

John B. Drake, under date of October 27, 1890, addressed a letter to the Mayor and City Council of the City of Chicago, which appears in the Council Proceedings of November 7, 1890 (page 1017), in which he offered to the City for the use of the public an elaborate drinking fountain, which he described in the letter.

He stated among other things "I respectfully ask that a site for same be set apart with provision for its simple maintenance as to water, ice, etc." He also stated in the letter "It has been suggested that the most suitable site for the fountain and statue would be on the space in the open court between the City and County Buildings on Washington street. I would be glad to place the fountain there, if the suggestion meets the concurrence of the authorities of the City and County." (I append a full copy of the letter.)

This communication was submitted by his Honor, Mayor Washburn, to the City Council, and thereupon a motion prevailed to the effect that the tender made by John B. Drake as set forth in his communication be accepted, and that the Commissioner of Public Works be authorized and directed to grant permission for the erection of the proposed fountain.

At the same time that this communication was sent to the Mayor and City Council, a communication exactly similar to this with the exception that it was addressed to the Board of County Commissioners, was received by the County Commissioners of Cook County, was referred to the Public Service Committee, and on November 10th was reported back to that body by the Public Service Committee with the recommendation that the request of John B. Drake be granted as per his communication. This recommendation was concurred in, and report approved.

These facts appear from the printed reports of the Proceedings of the Board of County Commissioners, October 27, 1890, (page 760), when the communication was referred to the Public Service Committee, and November 10, 1890, (page 789'), when the report was made and approved.

Subsequently, on December 19, 1892, (Council Proceedings, page 1710,) it appears that the Mayor presented a communication to the City Council, enclosing a letter from John B. Drake, in which he invited the Council to participate in the ceremony of unveiling the statue on December 26, 1892. No further record appears in the proceedings of either the Board of County Commissioners or the City Council. Presumably, the unveiling and formal presentation took place on December 26, 1892, with appropriate ceremonies, but I find nothing concerning the same in the records of the City.

I have spoken to William C. Graves, Private Secretary of the President of the Board of County Commissioners, who is undoubtedly the person referred to in Mr. Drake's letter of the 14th inst. Mr. Graves says that inasmuch as the proposed County Building may cover a part of the ground now

occupied by the fountain, he was instructed to notify the trustees of the estate of John B. Drake to remove the fountain. The plans for the new building have not yet been drawn, and the exact dimensions or ground space it will occupy are unknown.

Mr. Graves further states that he had a letter of notification with him when he went to the Illinois Trust & Savings Bank, the trustee of said estate; but that when he learned that the fountain belonged to the City, he did not present the letter, but merely spoke about the necessity of removing the fountain.

The above are all the facts in the case that I have been able to ascertain which bear directly on the matters spoken of in the letter of Mr. Drake.

As to the question which Mr. Drake asks concerning the legal status of this gift, it is clear that all that the County authorities did in the matter was to grant permission to erect the fountain partly on its property, a license which it has the right to revoke if it requires the property for other public purposes.

It also seems quite clear that the City did not obligate itself in any way to maintain or preserve this fountain in its present location, either expressly or by implication.

The gift of Mr. Drake being for a purpose within the scope of the powers and duties of the City was a proper one, and the City had the right to accept same.

(Dillon on Munic. Corp., Sec. 566-572.)

In the case of a gift to a municipality of real estate which is dedicated to specific public purposes, such municipality may be compelled by a court of equity to preserve such property for the purpose. Our Supreme Court, in the celebrated Lake Front case, *City of Chicago v. Ward*, 169 Ill. 392, held that even third parties may maintain a bill in equity to enjoin the municipality from using a park for purposes prohibited by the terms of the trust under which the dedication was accepted. But in another case where property was purchased by the contributions of adjacent real estate holders and deeded to the county with a provision

in that deed that it was sold to the county "for court house and other court buildings," the court held that those words did not operate in anywise to limit or restrain the power of alienation by the proper county authorities. *Supervisors of Warren Co. v. Patterson*, 56 Ill. 111.

In my opinion, however, the principle of law which governs the question in this case is the one relating to gifts *inter vivos*, and the same rule applies here as would apply in case the donee was a person instead of a municipality. The Illinois Supreme Court, in the case of *Telford v. Patton*, 144 Ill. 620, decided that a gift *inter vivos*, is chiefly distinguished from a gift *causa mortis*, by the facts that the former is not made in view of expected or intending death, and that it is not revocable in its nature. The court further says:

"It is essential to a donation *inter vivos*, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, that there be 'such a change of possession as to put it out of the power of the giver to repossess himself of the thing given.' (1 Parsons on Cont., marg. page 234; *Dole v. Lincoln*, 31 Me. 422; *Robinson v. Ring*, 72 Me. 140; *Northrop v. Hale*, 73 Me. 66; *Grover v. Grove*, 24 Pick. 261.) The delivery must be made with the intent to vest the title in the donee. (*Jackson v. Twenty-third St. Ry. Co.*, 88 N. Y. 520.")

In the present case the late John B. Drake, in making this gift to the City, brought the same within the conditions stated in this decision. He divested himself of all control over this fountain when he presented it to the City. He would not, if alive, have the power to insist on its being maintained in any particular way, or at any particular place; consequently, his trustees have no greater power in this respect. The City has a right to dispose of this fountain as it sees fit.

Respectfully submitted,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Sale of Fireworks—Power of Mayor to Fix Amount of Bond.

June 23, 1905.

EDWARD M. LAHIFF, ESQ., City Collector.

Dear Sir:

Your letter of June 22d, addressed to the Corporation Counsel, in which you make some inquiries in regard to Section 887 of the Revised Municipal Code which relates to the sale of fireworks, was referred to me for an opinion.

I find that the section referred to does not fix the amount of the bond required. It, however, provides that the application should be made to the Mayor, and not to the City Clerk as you state in your letter. I am of the opinion that this section of the ordinance was intended to give the Mayor full discretion in regard to the amount of the bond, and also whether both the Fire and Police Departments should pass on the application before permit is issued. The ordinance itself would seem to make it obligatory upon the City Clerk to issue such a permit under all circumstances if application is made and bond tendered, but under the authority vested in the Mayor to enforce such regulations as may be necessary to guard against destruction of property, the Mayor has full authority to fix the amount of the bond, which need not be the same in all cases, to require an inspection by either the Fire or the Police Departments or both, and to make such other conditions as in his judgment are necessary to protect the public from the danger incidental to this business.

The bond should be an ordinary indemnity bond and should be conditioned as follows:

“The condition of the above obligation is such that, whereas the said (herein insert name) has made written application to the Mayor of Chicago to keep and expose for sale fireworks to be used on (herein insert date), and a permit having been granted to the said (herein insert name), authorizing the keeping and ex-

posing for sale of fireworks, at (herein insert place) for a period not to exceed 5 days prior to and including (herein insert date); Now, therefore, if the said (herein insert name) shall faithfully observe and conform to the ordinances of the City of Chicago concerning or in any manner relating to the storage and sale of fireworks, and shall pay to the City any loss, damage, expense or liability which it may suffer, or which it may be put to, or which may be recovered from it, from or by reason or on account of the issuance of such permit, or from or by reason of any act or thing done under and by virtue of the authority given in such permit, then this obligation shall be void; otherwise to remain in full force and effect."

The above condition is drawn in conformity with the section referred to.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Application for Permit to Put in Street Car Track After Time Granted in Ordinance Has Expired.

June 30, 1905.

JOSEPH M. PATTERSON, Esq., Commissioner of Public Works.

Dear Sir:

April 13, 1905, J. M. Roach, president and general manager of the Chicago Consolidated Traction Company, applied to your predecessor for a permit "to put in about 600 feet of track on 40th avenue at the terminal of our road." Attached thereto is a sketch showing the proposed work. The application was transmitted to this department for an opinion as to the legal status.

April 5, 1893, the City Council of the City of Chicago authorized the Jefferson Street Railway Company to con-

struct and operate a railroad with one or more tracks, not exceeding two, with such tracks for turntables, turnouts, sidetracks and switches as said company may deem necessary, along or upon certain streets or parts of streets in the corporate limits of the City of Chicago thereafter named. Among said streets named was:

“ * * * commencing at the intersection of Elston avenue and Crawford avenue, northerly on Crawford avenue to Peterson avenue * * * .” (See Section 3 of the ordinance.)

Section 5½, entitled “Time of Completion,” is as follows:

“The railway hereby authorized shall be completed and in operation on or before two years; provided that if said company shall be delayed by the order or injunction of any court, the time of such delay shall be deducted from the above time prescribed; *provided*, however, that counsel for the City of Chicago may intervene in any suit in which any injunction or restraining order may issue or be entered, and may move for its dissolution or dismissal.”

It appears that no tracks were ever constructed by said company, or its successors, the Chicago Electric Transit Company and the Chicago Consolidated Traction Company, which latter company now claims to be the successor of said Chicago Electric Transit Company, and which applies for this permit, and so far as this department is informed, no order or injunction of any court delayed such construction.

In accordance with the precedent heretofore established by this department and sustained by the Circuit Court of Cook County in the suit instituted against the City and its officers by the Northwestern Elevated Railroad Company, we are of the opinion that the company has lost its right to construct this 600 feet of track for which application is now made after the lapse of said period of two years prescribed by said Section 5½, and that it will be necessary for the company to apply to the City Council for authority so to do.

The ordinance granting authority to the Jefferson Street Railway Company to operate in said street is printed at page 1229, Vol. 2 Special Ordinances of 1898.

I return herewith said application and sketch.

Very truly yours,

WM. H. SEXTON,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

Assignment of Wages of City Employees.

July 5, 1905.

JOHN L. HEALEY, ESQ., Paymaster.

Dear Sir:

At your request, I have made a careful examination of the "Act in relation to the assignment of wages, income or salary," which goes into force the 1st of July, 1905.

I am of the opinion that whenever a person presents to you anything claimed to be an assignment of wages or salary of any person employed by the City, you should insist upon a strict compliance with the law, and should take every measure to protect, not only the City but its employe.

The statute requires every assignment of this kind to be in writing, signed by the assignor, and by his wife if a married man, acknowledged by the assignor, and his wife if he is a married man, before a Justice of the Peace in the town in which the assignor resides, and to be entered by such Justice upon his docket, and makes it void, unless within three (3) days from the date of the execution and acknowledgment of such assignment, a true and complete copy of the assignment and of the certificate of its acknowledgement is served upon the City from which such wages or salary is due, or to become due in the same manner that

summons in chancery are to be served. A summons in chancery is served by reading the same to and in the presence and hearing of the defendant, or by leaving a copy of the same with some person over the age of 14 years, who is a member of the family of that defendant, and informing such person of the nature and contents of the document.

Unless the assignment tendered to you complies strictly with the law, you should inform the party tendering it, that you decline to receive it or be bound by it. You should reject every assignment that is not signed and acknowledged by the wife of the assignor, unless the assignment distinctly states upon its face, that the assignor is a single man. If you know the assignor to be a married man you should disregard any assignment that says he is a single man.

Every assignment of wages to be earned, in whole or in part, more than six months after the making of the assignment is absolutely void, and you should disregard them.

Every assignment given as security for a loan tainted with usuary or to secure the payment or fulfillment of any usurious contract, or the payment of the principal or interest of any usurious debt is absolutely void, and every such assignment should be disregarded by you.

You should disregard every assignment brought to you or served upon the City at any time more than three days after the date of its execution and acknowledgment.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

Opinion Upon the Validity of Statute Providing for Garnishment of Salaries of Public Officers.

July 7, 1905.

HON. E. B. TOLMAN, Corporation Counsel.

Dear Sir:

In response to your verbal request, I present herewith the grounds upon which I base an opinion as to the invalidity of a certain act entitled "An Act to subject the salary and wages of officers and employes of counties, cities, villages, school districts and departments of either thereof to garnishment and attachment," approved May 11, 1905.

The first point that occurs to me is that the title of the act includes as subject to garnishment the salary and wages of officers and employes of counties, cities, villages, school districts and the departments of either thereof to garnishment, while Section 1 of the act provides that the salary or wages of any officer or person employed by any county, city, *town*, village, school district or any department of either thereof shall be liable to processes of garnishment or attachment. The title therefore, omits to include among the municipalities or political subdivisions whose employes and officers' salaries are subject to garnishment, *towns*, which are included in Section 1. To this extent, therefore, the title of the act is ungermane to the subjects included in the body of the act itself.

Second: Section 1 provides that all employes and officers of municipalities and political subdivisions "shall be liable to the process of garnishment and attachment in the following manner and extent and with the same effect that the salaries or wages of any other person is or are now or may hereafter become under any provisions of any law of this state liable to such process."

A perusal of the above quotation will show that it is utterly meaningless, for the reason that it provides that municipalities or political subdivisions shall be subject to

garnishment "*in the following manner and extent*" and then goes on to provide that they shall be liable "*with the same effect that the salaries or wages of any other person is or are or may hereafter become under any provisions of any law of this state liable to such process.*"

The section thus points out a method of procedure which shall be followed and which shall limit the extent to which these corporations shall be liable, and then in utter contradiction of this provision provides that the salary and wages of employes and officers shall be liable in the manner now provided, or which may be hereafter provided by law. A contradiction is at once established in terms, and it is impossible to tell whether the proceeding is governed by the provisions of this statute, or by the garnishment act already in force. To state it somewhat differently—are the employes and officers to be subject as to garnishment proceedings to the act of May 11, 1905, or to the garnishment act in force at that time?

Third: The title to the act includes only counties, cities, villages, school districts and their departments as being subject to garnishments as to the wages of their employes. Section 1 of the act increases the number of subdivisions by the addition of towns. This enumeration or classification of municipal bodies and *quasi* corporations is apparently an arbitrary one, and excludes from its operation the state itself and many of its political subdivisions, such as highway commissioners, park boards, pension boards, trustees of drainage districts, and many other similar bodies which will readily occur to you.

I think the law to be that to countenance any such differentiation between any cities or any political subdivisions of the state the exemptions or classifications as the case may be, must be based upon a clear legal and valid reason which is apparent from a consideration of the act itself, and that any arbitrary division, such as the above, cannot be countenanced and will invalidate any act wherein it occurs.

People ex rel. Thorp, et al. v. Board of Trustees of Normal, 170 Ill. 468.

People ex rel. Stuckart v. Knopf, 183 Ill. 410.

Knopf v. People ex rel. City of Chicago, 185 Ill. 20.

The act in question, by Section 6 thereof, provides that an officer refusing to deposit money after an order of the court may be summarily dealt with as in contempt cases—a harsh and novel form of procedure not found in the old garnishment act. To subject the officers of the municipalities and subdivisions named in the act to this summary and heretofore unknown process while at the same time exempting from such process the officers of other bodies where no possible reason for such discrimination and exemption is shown, nor can be shown, is class legislation of the most flagrant character and clearly in contravention of our state constitution. I can see no reason why the employes of drainage boards should not be subject to have their wages garnisheed to the same extent as the employes of towns. Both are governmental divisions of the state, or *ininvitum* corporations and to subject the officers of one corporation to the drastic penalties of this act while excepting the officers of other corporations similarly situated, is grossly discriminatory and without any show of reason.

Fourth: This is also class legislation in that it imposes upon the employes of the municipalities and bodies mentioned in the act the burden of having their wages subject to garnishment in a different and more irksome way from other citizens of the state. The law provides for garnishment in a certain manner of citizens in general of this state, while this act provides for garnishment of the employes of the corporations and bodies named therein in an utterly different manner, and one more harsh, since in the ordinary garnishment proceedings the garnishee may appeal from the decision of the court which renders judgment against the garnishee, thereby protecting the rights of the judgment debtor, while in the act under consideration no appeal is allowed the garnishee, thus concluding the rights of the judgment debtor to a trial in the court where the action is commenced.

Fifth: It is class legislation in that it provides, by Section 6, that:

“in case the officer garnisheed shall fail to file an answer and make such deposit within the 10 days after service of the summons aforesaid, then the court shall have power to subpoena the said officer served to appear before said court, and compel such officer to file said answer, and if it shall appear to the court that any money is due to the employe or officer, whose wages or salary is garnisheed, from the defendant corporation, the court may order the same deposited within a time specified, and if such officer shall still refuse to deposit the same, the court may proceed against the officer served as in cases of contempt.”

It is apparent that the garnisheed officer of a municipal corporation or other body mentioned in the act is treated in an entirely different manner from any other garnishee in the state. Under the old garnishment law if a garnishee proved recalcitrant and refused either to make a proper or truthful answer, judgment was rendered against him from which he could appeal. The present act grants no such privilege to the garnisheed officer. In case he fails to make the return demanded, he is punished for contempt and no right of appeal is afforded him. As a class, therefore, the garnisheed officers of the bodies enumerated in the act are subjected to hardships not imposed upon other garnishees in the state, and are deprived of privileges accorded other garnishees.

Sixth: The act is unconstitutional as depriving the officers required to make answer and deposit by Section 5 and Section 6 of property or liberty without due process of law. Section 3 requires that an officer of the corporation or body upon whom garnishee summons has been served shall, within 10 days, file an answer with the court stating the amount due the employe whose salary has been garnisheed *and shall deposit with the court the amount shown to be due said employe.* No provision is made in the event of there being nothing due the employe at the time of the service of process upon the corporation. Whether anything is due or

not, therefore, the officer served must make a return and a deposit, and by Section 6, in case he fails to make such an answer and deposit within a certain time he is subject to a subpoena from the court in the nature of a citation and upon the court's being convinced that there is money due the employe by the corporation, the court may order the money deposited by the officer of the corporation within the time specified, and in the event of the failure of the officer to comply with such order, he is subject to the pains and punishment as in cases of contempt. The officer to be served is, in cases of political subdivisions and their departments, the treasurer or clerk of said subdivision. In all other cases the person to be served is the presiding officer of the body in which the person whose wages are garnisheed is employed.

It is apparent that the head of a department is not the proper person in a municipal corporation to make an answer as to the amount of money due an employe in his department, nor could such head of department, under the law, make any deposit of money due an employe by the municipality. He is not the dispensing officer of the municipality, and has absolutely nothing to do with the funds due employes. It would be a physical impossibility as well as a legal one, to attempt to compel him to make answer and deposit funds due one of his employes; but this act provides that in case he do make such answer and deposit, and the court finds the money due the employe from the municipality, then the head of the department is subjected to contempt process. In other words, he is fined or imprisoned for the non-performance of an act which it is beyond his power to perform, and either his property in the shape of a mulct in money or his liberty is taken away in a summary and unconstitutional manner.

Seventh: The act is invalid on account of the uncertainty and vagueness in the provisions in Section 2 as to who shall make answer to the garnishee summons. As pointed out above, in the cases of political subdivisions the treasurer

or clerk, in other cases the presiding officer of the body or the head of the department in which the employe is engaged shall be served with process, and the answer *shall be made by the officer or person upon whom such service is made or by some other officer or person having knowledge of the facts.* It thus appears that the answer shall be filed either by the officer served, or by any other person in the employ of the municipality, or out of it, in the city, county, state, United States, or not, Who Has Knowledge Of The Facts. Following upon this provision Section 3 expressly provides that "the officer of the corporation upon whom such garnishee summons shall have been served shall * * * file or cause to be filed with the Justice of the Peace * * * an answer under oath, stating the amount due the employe * * * he shall also state whether such employe * * * is the head of a family * * * and he shall also deposit with such justice * * * the amount so shown to be due * * *."

Thus, after providing that any person on earth having knowledge of the facts may make the answer, the act goes on to provide that the officer of the corporation shall make the answer setting forth certain facts. It is absolutely impossible to determine from a consideration of Sections 2 and 3 who is to answer, and on account of this indefiniteness these sections are invalid, and eliminating these sections, the entire act must fall.

Eighth: The act is unconstitutional in that by the provisions of Section 2 only the officers of political subdivisions and their departments are subject to garnishment, whereas employes and persons holding other positions than offices are exempt in that no provision is made for the garnishment of their wages. Section 2 provides:

"When the salary or wages of any officer of such political subdivision or department thereof is or are sought to be attached * * * the garnishee summons or writ of attachment shall be served upon the treasurer or clerk of such political subdivision or department thereof."

No provision is made where the salary or wages of an *employe* of such political subdivision or department thereof is sought to be garnisheed, thus subjecting the officers of such political subdivisions to hardships and burdens not borne by employes, and in this respect also this section (2) is entirely inconsistent with both Section 1 and the title of the act, both of which provide that the salaries of the employes of political subdivisions may be garnisheed, whereas by the provisions of Section 2 no method for effectuating such garnishment is provided.

Section 7 is indefinite and contradictory in its terms, and with the provisions of Section 2. As before pointed out, any person having knowledge of the facts may make answer to the garnishment summons, but Section 7 provides that where the officer served is without the jurisdiction of the court, his deposition shall be taken in response to a *dedimus potestatem*. If the officer, therefore, upon whom summons has been served is without the jurisdiction of the court, he must make an answer in the form of a deposition, irrespective of the fact that Section 2 provides that any person having a knowledge of the facts may make the answer. In respect to the taking of his deposition, I know of no case where the defendant is bound by his deposition taken at the instance of the plaintiff.

In conclusion, I have not the slightest doubt that the act itself is invalid, both *in toto* and from the fact that certain sections, the elimination of which would render the act incapable of enforcement, are also invalid. A determination of the validity of this act in the most speedy manner has occasioned considerable doubt in my mind as to the best method of procedure. While the act itself provides for no appeal, it may be that under the provisions of the former garnishment act an appeal might be taken or the record of a cause tried before a Justice of the Peace removed to an upper court by writ of certiorari. Again, the head of the department or officer upon whom the duty is imposed to file the answer, might refuse to do so and bring *habeas corpus* to escape the penalty which should be inflicted by reason of

his refusal. A more desirable way than either of these would be if a test case could be instituted in the Circuit or Superior Court, and taken at once to the Supreme Court.

Yours respectfully,

J. W. BECKWITH,

Asst. Corp. Counsel.

Legal Status of 79th Street.

July 10, 1905.

MR. CHARLES RINGER, Secy., Cheltenham Improvement Association, 79th street and Commercial avenue, City.

Dear Sir:

In response to your request for an opinion as to whether or not 79th street is now legally open to Lake Michigan, or whether there is a lot known as Lot "C" between the foot of 79th street and the lake, I will say that in accordance with an ordinance of the City Council of Chicago, passed on the 4th day of May, 1891, it was ordered that 79th street be opened from the east line of Section 31, T. 38, N. R. 15 E. to Lake Michigan by condemning therefore the South 33 feet of Fractional Section 29-38-15; and the North 33 feet of Fractional Section 32-38-15 and the Corporation Counsel was directed to institute proceedings for the condemnation of the above described land. In accordance with the provisions of this ordinance a petition was duly filed by Corporation Counsel John S. Miller on the 24th day of July, 1891, and on January 14, 1892, a verdict was rendered assessing the damages of the owner of the above described property, "to the shore line of April, 1891, exclusive of all riparian rights beyond said shore line." On the 6th of April, 1894, the order of possession was entered.

I am of the opinion, therefore, that 79th street is legally open to the shore line of 1891. Whether or not the Lot "C", mentioned in your letter, lies wholly or in part east of said shore line of 1891, can only be determined by survey. All

riparian rights beyond said shore line having been expressly reserved to the owners of the condemned property and excluded from the condemnation proceedings, I am of the opinion that any natural accretions east of the short line of 1891 would belong to the owner or owners of the property which bounded the lake and was condemned as above set forth.

Very truly yours,
 CECIL PAGE,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Assistant Corporation Counsel.

Draft Made Upon City Treasurer for Advance Salary as an Assignment of Wages.

July 10, 1905.

HARRY HILDRETH, ESQ., Deputy City Treasurer,

Dear Sir:

Replying to your inquiry of recent date as to the effect of the new statute upon the slips that were in use in the past, in cases where an employe of the City has obtained an advance of part of his salary, I have to say that, in my judgment, the form now in use conflicts with the statute and the use of it should be discontinued. The slip authorizes the Treasurer to pay to himself out of the employe's salary, a certain sum, and authorizes the Treasurer to receipt for and endorse in the employe's name, the City Paymaster's check for the salary for that month. This is equivalent to an assignment, and as it is not in the form prescribed in the statute, it is void.

I am of the opinion that if a City employe makes his draft upon the City Treasurer directing the Treasurer to charge the same to his account, that will not be an assign-

ment under the statute, unless the draft is for a greater sum than has been earned at the time of its acceptance.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:
EDGAR B. TOLMAN,
Corporation Counsel.

Peddlers' License—When Required.

July 11, 1905.

JOHN E. TRAEGER, ESQ., City Collector.

Dear Sir:

Replying to your request of the 10th inst., for an opinion on the state of facts disclosed in the attached letter of Pacific Coast Borax Company, I beg to say it appears from the letter and from the verbal statement of Deputy McCarty that this company sends an agent from house to house selling soap or borax; that the agent does not confine himself to taking orders but has the unsold goods with him, which he secured, they say, from the purchaser's grocer, or nearest grocer in the district; that there is no connection or agreement between such agent and the grocer. Under these circumstances this company is not doing an interstate commerce business.

Section 1590 of the code provides as follows:

“Every person who shall sell or offer for sale, barter, or exchange, at retail, any goods, wares, merchandise, fruits, vegetables, or country produce, traveling from place to place on, along, or upon the streets of the city, or who shall sell and deliver from any wagon, pushcart, or other vehicle going from place to place, any goods, wares, merchandise, fruits, vegetables, or country produce, or who shall go about from place to place selling and delivering goods, wares, merchandise, fruits, vegetables, or country produce, shall be deemed a peddler and shall before engaging in such business obtain a license as a peddler as hereinafter provided.”

Section 1592 of the code provides in part as follows:

“The fee to be charged for a license to peddle from a wagon or other vehicle drawn or propelled by animal power other than that supplied by a human being or drawn or propelled by mechanical power shall be fifty dollars per annum. Such license shall entitle the licensee to use one such wagon or similar vehicle in and about his business. For each additional wagon or other similar vehicle used by him in and about his business he shall pay an annual license fee of fifty dollars.”

I am of the opinion that this company's method of doing business brings it within the provisions of the code and it is obliged to comply therewith.

Yours truly,
MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:
WM. D. BARGE,
Corporation Counsel.

Licenses That Are Transferable.

July 12, 1905.

MR. JOHN E. TRAEGER, ESQ., City Collector.

Dear Sir:

A communication from the City Collector dated June 23, 1905, in which he asks an opinion as to what licenses outside of saloon licenses are transferable under the Revised Municipal Code, was referred to me for reply.

In response to same, I have gone through the new Municipal Code and have made a classification of all the licenses which are required under the new code, and same appears below. Saloon and dramshop licenses are, of course, expressly excepted from that section of the ordinance which provides for transfers of licenses. Detective agencies are also, by the terms of the section in which they are provided for (744), declared to be non-transferable.

Section 1332 of the code provides that—

“Any person to whom any license shall have been issued may, with the permission of the mayor, assign and transfer the same to any other person. * * *”

This section also provides for a new bond in case of such transfer.

It is quite clear that it was the intention of the Council to permit the transfer of all licenses except saloon and dram-shop licenses, which are expressly excepted in this section of the ordinance, and detective agency licenses, which are excluded by another section of the code. Therefore, by implication, all others would be included within the provision for transfers, unless there is some special reason for excluding them.

There is, however, another class of licenses which must be regarded as non-transferable. This class includes all which are issued only upon an examination as to the qualifications of the persons desiring them. Such a license is practically a certificate of the necessary mechanical skill to follow the calling for which the license is issued. Those that come under this classification are the following: Automobile operators; drain layers; undertakers; plumbers; stationary engineers. The licenses of City weighers are also non-transferable, as these persons are appointed by the mayor.

As to the licenses outside of saloon and detective agencies, which I have included among those not transferable, I will state that the only ground for classing them in that category is that an ordinance must not be construed in such a way as to lead to an absurdity, and it would be manifestly absurd to transfer a license which was issued to a person after an examination as to his skill in a particular calling to another person who has not been so examined. In other words, such licenses are personal in their nature, require especial skill and aptitude, and a part of the license fee is intended to cover the expense of the examination of the application. The same rule would apply to licenses which require that the applicant show good moral character, were it

not for the fact that the provision for transfer is clear, and for the further fact that the Mayor, in authorizing such a transfer, has it in his discretion to inquire into the character of the new applicant.

As to dog licenses, while they are transferable so far as changing the ownership of the dog is concerned, they must be held to apply to only the dog registered.

This is true also as to vehicles, tickers and other articles requiring a license. Vehicles, tickers, etc., may be transferred from one owner to another without an additional license fee. But the ordinance relating to transfers does not contemplate the change of a license from one vehicle to another, nor from one dog to another, nor from one ticker to another. It provides only for a transfer from one person to another. I therefore make the following classification:

TRANSFERABLE.

Amusement, auctioneer, billiard room, bill poster, baker, broker, contractor, dog, sale of liquor by druggist, sale of explosives, cigarette, hospital, milk vendor, ice, night scavenger, private scavenger, slaughtering, workshop, brewer and distiller, wholesale malt liquor dealer, wholesale spirituous liquor dealer, wholesale vinous liquor dealer, lumber yard, meat dealer, delicatessen store, poulterer, fishmonger, nursery, pawnbroker, peddler, peddler from push-cart, pack peddler, peddler from basket, oil peddler, housemover, roofer, runner, second-hand dealer, junk-shop, shooting gallery, soap factory, tannery, ticker, vehicle drawn by horses from conveying persons for hire or reward, driver of same, public automobile, operator of public automobile (not however his license as automobile operator), public cart, driver of public cart, automobile used as public cart, operator of automobile used as public cart (not however his license as automobile operator), livery stable.

NOT TRANSFERABLE.

Saloon or dram-shop, detective agency, automobile operator, drain layer, undertaker, plumber's certificate, stationary engineer, City weigher.

I have reached the above conclusions after going over the statutes, the decisions relating to the subject, and the rules that have heretofore been applied. It was held in this state that without express ordinances to that effect licenses were not transferable. (*Munsell v. Temple*, 8 Ill. 93; *Lombard v. Cheever*, 8 Ill. 469.) This rule still holds good, and it is only by express provision of the ordinances that transfers can be made.

Another rule which has been recognized by the courts of our state in passing on the transferability of licenses is the one to the effect that licenses imposed for regulation are not transferable, but that where imposed solely for purposes of revenue they are transferable. (Am. & Eng. Enc. of Law, 2d Ed., Vol. 21, p. 825.) This rule, however, would hardly apply to most of the licenses which I class as transferable, because they are generally imposed partly for purposes of revenue and partly for purposes of regulation. Besides, the rule has no application in the face of the express terms of the ordinance relating to transfers.

The power to license comes within the police powers of a municipality. The right to license is given the City on that ground by the statutes. The City, having the power to license, it must follow that it has the right (if not restricted by statute) to make rules governing the transfer of such licenses in all cases where it is not against public policy to do so. The statutes restrict the transfer of saloon or dram-shop licenses only. The transfer ordinance being valid, the classification given above is therefore warranted by law, and Section 1332 should be construed accordingly.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

EDGAR B. TOLMAN,

Corporation Counsel.

Divisibility of License Fees.

July 12, 1905.

JOHN E. TRAEGER, Esq., City Collector.

Dear Sir:

Your letter of July 5, 1905, in which you enclose letter from the Attorney of the United Cigar Stores Company, calling attention to the recent decision of the Supreme Court in the case of *Spiegler v. City of Chicago*, and claiming that this case supports his contention that cigarette licenses can be paid proportionately for a part of a year, and asking to be advised concerning same, has been assigned to me for an opinion.

The case referred to (*Spiegler v. City of Chicago*—not yet reported) was argued on entirely different propositions than the one which we are now considering. One of the questions before the Supreme Court in that case was whether the annual license fee of \$10.00 for Oil Peddlers was a reasonable fee, and in deciding this point and holding that the fee was reasonable, the court stated incidentally that a proper construction of the ordinance meant that a license fee of \$10.00 should be paid for a full year or a proportionate part of that sum for a fractional part of a year. The ordinance before the court provided for an annual license fee “at the rate of” ten dollars. The question of whether the license fee was divisible and whether only a proportional amount was required for a part of the year, was not an issue in that case, although as the ordinance then stood the decision was undoubtedly correct, and we would have been bound by it, even though the expression of the court was pure *dictum*.

Since this case went to the Supreme Court a new code has been adopted, which in the most precise language does away with any question of the kind that is now raised. The old code provided for a proportional fee for cigarette licenses, but the new code does not.

Section 1329 of the new code reads as follows:

“No license shall be granted for a less period nor for a longer period than one year, unless specific provision shall elsewhere be made in this ordinance for the issuance of a license for a period of less than one year; and every license shall expire on the last day of April next following its issuance, unless otherwise specifically provided in this ordinance.

“The fee for each license issued shall be collected in full at the time of the issuance and delivery thereof unless specific provision to the contrary be otherwise made in this ordinance. * * *”

Section 1335 specifies the manner in which the amount shall be computed where specific provision is made for the issuance of a license for less than the full annual license fee or for a part of a year, etc.

These two sections clearly govern the issuance of all licenses, and provide for an annual fee only, except in so far as there is special provision made for partial or term payments. Hence, although, in the sections providing for Bill Posters, Cigarette and Lumber Yard licenses, it is provided that the license fee shall be “at the rate of” a certain amount per annum, still these words cannot be construed as meaning that the fee is divisible or that a proportionate amount only is to be collected when issued for a part of a year.

These two sections are also clearly applicable to licenses for the Sale of Explosives, Plumber, House Mover, Runner, Driver of Public Cart and Operator of Automobile Used as a Public Cart, in all of which cases the license period is not specifically stated. It must be understood as for one year.

These sections also apply to Detective Agencies, Night Scavengers, Private Scavengers and Slaughtering licenses, where the ordinance provides for the issuance of licenses “from time to time,” although in the case of the last two mentioned annual fees are specified.

In all other cases the various sections of the ordinance use language which cannot be misunderstood, and there can therefore be no question as to the terms and manner of payment of the licenses provided for therein.

You also ask in your letter for an opinion as to just what other licenses besides saloon licenses are divisible. I have gone through the new Municipal Code and find that the following licenses are divisible, and I specify in each case in what manner the license fee should be collected.

Theaters, Opera Houses, etc.; Buildings Designed for General Entertainments; Halls for Entertainments of the 13th Class; Baseball Parks; Billiard Rooms; Milk Vendors; Undertakers. The code provides that if less than 6 months of the annual license period shall have expired at the time of the issuance of such license, the full annual license fee shall be charged therefor; if more than 6 months of the annual license period shall have expired, one-half the full annual license fee shall be charged.

Amusements which are not given in licensed places. Section 102 provides specifically for charges and terms.

Brewers and Distillers; Wholesale Malt Liquor Dealers; Wholesale Spirituous Liquor dealers; Wholesale Vinous Liquor dealers. The code provides that a license may be issued for one year or for any number of months less than a year.

Peddlers from Wagons; Peddlers from Push Carts; Pack Peddlers. The code provides that the license fee can be paid in quarterly installments, on the first day of February, May, August and November. A license may issue for one-fourth of a year, but not less.

Peddlers from Baskets. The code provides that the license fee may be collected in monthly installments.

Ice. The code provides that the license shall be paid for semi-annually, on May 1st and November 1st.

All of the remainder of the licenses provided for in the code are payable for the full term of one year and where issued for a fractional part of a year, the full annual license fee must be paid.

Yours respectfully,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

EDGAR B. TOLMAN,

Corporation Counsel.

Power of Mayor to Make Appointments During Vacation and to Accept Resignations to Take Effect at Future Date.

July 13, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir :

Answering your verbal inquiry as to your right to make appointments during vacation, the method of exercising that right and the status of the appointees, I beg leave to say :

Section 3 of Article VI of the Cities and Villages Act provides :

“All officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all offices except the mayor and aldermen shall be filled by like appointment) by and with the advice and consent of the city council.”

You have the undoubted power to make appointments under this act at any time, but the appointment does not become operative until the City Council concurs. The City Council has now adjourned for the summer vacation, and its next regular meeting has been duly fixed by ordinance for September 25th.

Section 17 of Article III of the Cities and Villages Act provides :

“The mayor or any three aldermen may call special meetings of the city council.”

Rule 1 of the Rules of the City Council provides :

“Regular meetings of the City Council shall be held every Monday evening at 7:30 o'clock, unless otherwise ordered at a regular meeting. Special meetings may be held at any time, on call of the mayor, or any three or more aldermen ; such call shall be in writing, duly signed, and shall be presented to the clerk, who shall proceed immediately to prepare notices of the same, and shall cause them to be served on the members of the council, in the usual manner ; such notices shall describe, in brief, the nature or objects of the call.

“At every special meeting the call for the same shall be read and afterward filed by the clerk; and no business, other than that proposed by the call, shall be in order at such meeting.”

I am of the opinion that under these statutory provisions and rules you may call a special meeting of the City Council at any time for the purpose of receiving and acting upon your appointments, and that at such special meeting the Council will have power to take action.

You have also asked me if you have the power to accept the resignation of an office which is to take effect in the future and whether you may make an appointment to fill such vacancy, said appointment to take effect at such future date. My answer to these questions is in the affirmative. (*State v. McGrath*, 64 Mo. 139; Am. & Eng. Ency. of Law, Vol. 23, pp. 346, 347, 412, 423.) An appointment made by you in such circumstances and concurred in by the City Council would take effect, without further action, on the date fixed in the resignation and appointment.

Very respectfully,

EDGAR B. TOLMAN,

Corporation Counsel.

Power of City Council to Vacate Alley.

July 15, 1905.

CHARLES J. BUHMAN, Esq., Supt., Bureau of Maps.

Dear Sir:

We have your letter of July 13th enclosing a certified copy of the ordinance passed July 5, 1905, vacating part of an alley in Block 2, in Quentin's subdivision of Block 22 in Sheffield's Addition to Chicago, and providing for the opening of a new alley to Lot 11 in that block.

You state in your letter that Lot 11 has never been fenced and from an examination of the premises, it appears as if part of the lot had been used as an alley for at least

15 years, and you ask whether you can approve a plat and permit the closing of what you think has become a public alley by user, and whether the petitioner could subdivide the lot as shown upon the plat accompanying the ordinance.

It is clearly within the power of the City Council to vacate any alley within the limits of the city and to make such vacation upon such condition as it may prescribe. In this case, the vacation is upon the condition that a new alley be dedicated. This absolves you from all responsibility in the matter and is sufficient justification for the approval of the plat attached to the ordinance.

As to the supposed closing of an alley that the City may have acquired by user, that is a matter left entirely to the City Council, and inasmuch as the City Council has authorized the closing of one certain alley, according to the plat attached to the ordinance, which plat ignores the supposed existence acquired by user, you are justified in approving the plat, even though you do think that will deprive the City of this supposed alley.

Herewith we enclose the copy of the ordinance which was sent, together with the copy of the plat that you prepared.

Yours truly,
WILLIAM D. BARGE,
Assistant Corporation Counsel.

Approved:
JAMES HAMILTON LEWIS,
Corporation Counsel.

Dramshops Conducted in Harbor of City Required to Procure a License.

July 20, 1905.

JOHN E. TRAEGER, ESQ., City Collector.

Dear Sir:

In your favor of the 29th ult. you request the opinion of this department as to whether the Columbia Yacht Club should be compelled to take out a dramshop license or to

cease selling liquor in its club house, which is built on piling in the waters of Lake Michigan in the harbor of the city. I have examined the chart or plat of the district in which the club house of the Columbia Yacht Club is located and have perused the brief of the judge advocate of the club, both of which documents accompany your letter.

It seems to be conceded by the parties interested that the club house is and always has been situated in waters which are much less than three miles from the shore line of the city. The Revised Municipal Code of Chicago of 1905, contains the following provision (Chapter 31, Article 1, Section 969):

“The harbor shall consist of the Chicago river and its branches to their respective sources, the Ogden canal, all slips adjacent to and connecting with the Chicago river, the Calumet river and all slips connecting therewith, the drainage canal, all piers and basins, and the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein for a distance of three miles from the shore between the north and south lines of the city extended. The harbor as herein defined shall be subject to the control of the harbor master, under the supervision and according to the directions of the commissioner of public works, and the use thereof shall be governed by the ordinances of the city. * * *”

Section 975 of the same chapter and article reads as follows:

“The harbor master and the assistant harbor masters shall be sworn in as special policemen by the superintendents of police, for the purpose of carrying more readily into effect the police regulations of the city concerning the harbor under their charge and to preserve the public peace and quiet in and about the harbor, and for such purposes shall have all the power and authority of police officers under the laws of the state and the ordinances of the city.”

These sections are practically identical with Sections 791 and 790, respectively, of Chapter 34 of the Revised Code of Chicago of 1897. Chapter 36, Article 1 (Sections 1336 to 1354, inclusive) of the Code of 1905 and Chapter 39, Article 1 (Sections 1175 to 1188, inclusive) of the Code of 1897, re-

late to saloons and dramshops. As you are doubtless familiar with the articles referred to, any quotations from them may well be omitted.

I am of the opinion, in view of the City ordinances relating to the harbor and dramshops which have been quoted above or referred to, that the Columbia Yacht Club was and is required to procure a license for the sale of liquor in its quarters located in the harbor, and was and is liable for the penalties fixed by the dramshop ordinance for non-compliance therewith. In the event of the continued refusal of the club to procure and pay for a dramshop license, the commissioner of public works and his subordinate, the harbor master, are vested with ample powers to check the sale of liquor by the club, its officers or agents, and it seems to me that the best course for the City to adopt is to prevent any further sales of intoxicating liquors until a license has been obtained. The fact that the Columbia Yacht Club is a club organized in good faith for social purposes, and the further fact, if it be a fact, that liquor is furnished to club members only, cannot operate to remove the club from the operation of the dramshop ordinance. It is true that in some states the facts mentioned would be of controlling importance, but the rule in this state is as I have stated above. (*People v. Law and Order Club*, 203 Ill. 127; Am. & Eng. Enc. of Law, 2d Ed., Vol. 17, p. 361.)

It is now proposed to cover more fully the grounds upon which this opinion rests in connection with the points made by the judge advocate of the club in his brief. He contends, in behalf of the club, first—

That the limits of the City of Chicago reach only to the shore line of the lake; that the City has no title to any land beneath the lake; that the City has no jurisdiction or control beyond its limits and therefore it cannot control the use of the club house which is built in the navigable waters of Lake Michigan; second—

That the legislature has delegated to the City of Chicago powers over the harbor which are so exceedingly limited that they may be said to be confined practically to the control of

navigation, and do not include the right to govern the sale of intoxicating liquors in the harbor; third—

It is intimated that the federal liquor license held by the club affects the control of the City over the sale of liquor in the harbor.

In substance, then, it is insisted that if the dramshop ordinance when construed with the harbor ordinance, is to be taken (as it is here contended it should be taken) as applying to persons or corporations selling intoxicating liquors in waters within three miles of the city limits, then it is, to that extent at least, void because of want of power on the part of the City to adopt such an ordinance. These several points will be treated together.

In Vol. 21 of the Am. & Eng. Ency. of Law, 2d Ed., the following rules relating to navigable waters are laid down. It is said, on page 430:

“The title and dominion of tidal waters and lands are, in the United States, *prima facie* vested in the several states abutting thereon subject to the rights surrendered by the states in the Constitution, rather than in the general government or in individuals, and the title and dominion of the original thirteen states and of states since admitted are the same. As a general rule, the title of the states is regarded as vested in them for the public benefit, and, as will be seen hereafter, is not subject to absolute disposition.”

On page 433 of the same volume it is said:

“EXCEPT SO FAR AS CONGRESS MAY SEE FIT TO INTERFERE for the regulation of commerce, each state has exclusive jurisdiction over the navigable waters lying within its territorial limits, and may pass such laws regulating their use as it may deem wise. Until Congress acts upon the subject, a state has plenary power over navigable waters which are entirely within its confines, although connecting with waters beyond its boundaries.”

The correctness of the above rules has been recognized by our Supreme Court in *Revell v. People*, 177 Ill., p. 468.

Conceding, then, that the title of the City of Chicago to all land within its limits which touches upon Lake Michigan stops at high water mark, or the water line of the lake

(*Revell v. People*, *supra*, and *Bliss v. Ward*, 198 Ill. 104), what bearing does that proposition have upon the present question? The *Revell* case above cited, and those following it, deal with the rights of riparian owners. Under the view I take of the law, it is of no importance whether the State of Illinois or the City of Chicago is vested with the title to the lands lying beneath the waters in which the Columbia Yacht Club house is built. The City of Chicago does not rest its right to exercise the authority which it is proposing to exercise over the Columbia Yacht Club upon any claim as a riparian owner. It claims that as the governmental agent of the state—the owner in fee of these submerged lands—it has been entrusted by the sovereign power with the control of the waters (and the lands beneath them) in which the club house of the Columbia Yacht Club is situated. If the City could only govern such land as it held title to, its authority, even within the city limits, would be small indeed; in fact, there would be no need of fixing any city limits. The right of the State to delegate to municipalities the dominion or control for all police purposes over all navigable waters bordering upon or lying within the boundaries of such municipalities must be conceded, since the state might grant away the title to the bed of such waters itself for public purposes. (*Cobb v. Commissioners of Lincoln Park*, 202 Ill. 427, and *Gordon v. Winston*, 181 Ill. 338.) It is immaterial to the questions here discussed that the United States has built piers, established dock lines, spent large sums on harbor improvements, and granted a liquor license to the Columbia Yacht Club. The control of Congress over those waters of Lake Michigan which are within the State of Illinois relates only to commerce, and so long as the State of Illinois directly, or through its duly selected agencies, refrains from interfering with commerce or navigation, it is supreme.

In Vol. 21 of the Am. & Eng. Ency. of Law, 2d Ed., it is said, on page 434 (citing cases in Notes 3 and 4):

“The fact that Congress has made appropriations for the improvement of certain navigable waters does not constitute such an assumption of control over them

as to prevent the State within which they are from legislating upon the subject.

“And when a city is made a port of entry Congress does not thereby assume to regulate its harbor or detract from the sovereign rights previously exercised by the State over its public waters.”

In *Cobb v. Commissioners of Lincoln Park*, 202 Ill. 427, 438, it was said:

“It is conceded that the power of Congress over the navigable waters of the country is derived from the commerce clause in the Constitution of the United States, and that it is exclusive and paramount, whenever Congress has definitely spoken on any subject under its jurisdiction. * * * We are of the opinion that the act prohibiting the erection of wharves without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation, and that the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of Congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the submerged land on which it is his purpose to build. Appellant not having, by the law of this State, the right to construct a wharf over his neighbor's submerged lands without his neighbor's consent, could not acquire that right, without his neighbor's consent, by obtaining a license from the Secretary of War.”

The language just quoted applies to the present situation with much force, inasmuch as the Columbia Yacht Club, while not claiming title to any submerged lands, yet denies any authority on the part of the City of Chicago to do more than merely consent to the presence of its club house in the harbor.

It is clear that a liquor license from the federal government is a protection from prosecution by its authorities, but not from prosecution by a state (or city) for violation of its laws (or ordinances) relating to the liquor traffic. (Am. & Eng. Ency. of Law, 2d Ed., Vol. 17, p. 238.)

A government liquor license is a mere tax receipt and grants no authority or privilege to the holder of it.

It is next proposed to take up the question as to whether the general assembly has delegated to the City of Chicago the power to exact a license fee from those conducting dram-shops in the city harbor.

It should be observed that the question as to whether any of the waters of Lake Michigan are within the city limits is unimportant, since the legislature may, if it sees fit, provide that the police powers of the City shall extend beyond its borders. Authorities are unnecessary to support this statement. (See Am. & Eng. Ency. of Law, Vol. 17, p. 289.)

It is now proposed to proceed with the discussion as to the powers delegated by the State to the City of Chicago relating to the control of the harbor.

Article 5, Section 1 of the Cities and Villages Act (Starr & Curtis' Ann. Stat. of Ill. 1896, Vol. 1, p. 689, confers the following powers, among others, upon the City Council:

"Thirty-fourth. To control and regulate the anchorage, moorage and landing of all water-craft and their cargoes within the jurisdiction of the corporation."

"Thirty-fifth. To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor or within such jurisdiction."

"Thirty-seventh. To collect wharfage and dockage from all boats, rafts or other craft landing at or using any public landing place, wharf, dock or levee within the limits of the corporation."

"Thirty-eighth. To make regulations in regard to the use of harbors, towing of vessels, opening and passing of bridges."

"Sixty-sixth. To regulate the police of the city or village and pass and enforce all necessary police ordinances."

"Ninety-sixth. To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the City Council or board of trustees shall deem proper: *Provided*, no fine or penalty shall exceed \$200 and no imprisonment shall exceed six months for one offense."

Section 10 of said Article 5 (Starr & Curtis' Ann. Stat. of 1896, Vol. 1, Paragraph 72, p. 721) provides:

“The city or village government shall have jurisdiction upon all waters within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the State.
* * *”

Under grants of power above quoted, and those found in Clauses 30, 31, 32, 33, 36, 39 and 46 (which relates to intoxicating liquors) of Article 5 of the act, I entertain little doubt that it was the intention of the general assembly to vest cities organized under the act with complete control of harbors and waters within three miles of their shore limits. The powers conferred are all police powers, and entrusted to cities for the protection of the life, health, safety, comfort and convenience of their inhabitants, and are to be construed with the accomplishment of these ends in view. The grant of power found in the 38th clause above quoted is exceedingly broad, the words used being very general—in fact, it is difficult to see what language could be more general than the words “To make regulations in regard to the use of harbors.” The suppression or regulation and licensing of the liquor business has been universally recognized by the courts as coming peculiarly within the scope of the police power, and whatever may be the rule in some states, saloon license fees must be regarded as imposed in Illinois under the police power rather than by virtue of the taxing power.

I think the power of the City Council, under the clause last referred to, to regulate and license the sale of liquor on the waters of Lake Michigan within three miles of the shore line of the City is clear; that this power might also be allowed to depend for its sanction upon Section 10 of Article 5 of the act alone. When that section is construed in connection with the other sections of the act to which reference has already been made, my conclusion as to this power of the City is strengthened.

It will be noticed by the language of Clauses 34 and 35 the powers there conferred are to be exercised “within the

jurisdiction" of the City, while where it was intended to limit the exercise of powers granted to the city limits, that limitation was expressed as in Clause 37. It may be said generally, that when limitations were intended in Article 5 of this act, it will be found that they have been expressed (see Clauses 81 and 91, for example), and I see no reason why in construing the act as a whole a limitation as to "city limits" is to be implied in Clause 38, or any other clause where the exercise of a power is not confined to the city limits.

I therefore cannot agree with the position taken by the judge advocate of the Columbia Yacht Club, and as I have before said, I think the club should be compelled to obtain a dramshop license.

I return herewith the chart or diagram of the harbor which was forwarded with your letter.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

**Interpretation of Contract With Lawyers Cooperative
Publishing Co. for Printing and
Distributing City Ordinances.**

July 20, 1905.

MR. E. H. ROCHE, Business Agent.

Dear Sir:

In your favor of the 12th inst. you ask the opinion of this department as to the right of the City to have printed and to distribute copies of the city ordinances relating to certain departments of the city government, in view of a contract entered into by the City of Chicago with the Lawyers' Cooperative Publishing Company. The situation is briefly as follows:

August 14, 1903, the Lawyers' Cooperative Publishing Company, a New York corporation, entered into a contract with the City under which the company agreed—"to set up, print, bind and publish," at its own expense, all the general ordinances of the City enacted prior to July 20, 1903, "as revised, compiled and arranged under the direction of the corporation counsel." The contract also specified the number of pages that such volume of ordinances shall contain, and provides that the index and all additional matter shall be "revised, compiled and arranged under direction of the corporation counsel"; the contract also provides that the City of Chicago shall furnish the copy and that the City Council "may give such name and title" to the new code as it sees fit. The company agrees to furnish to the City three hundred (300) copies of the new code, fully bound, for purposes of free distribution but not for purposes of sale; that the company will not charge in excess of six dollars (\$6) per volume for such code.

The City of Chicago, in consideration of performance by the company, "transfers, assigns and sets over" to the company "all right, title and interest of" the City "to the copyright privileges which said party of the second part (the City of Chicago) can or may have in said new code of Chicago, and grants to said party of the first part, its successors and assigns, exclusive right to dispose of and sell the same."

I understand that at the request of the Health Department you recently requested a price from the company on 5,000 copies of the health department ordinances in pamphlet form, and that you have secured a price from another printing house which is about one-third the price which the Lawyers' Cooperative Publishing Company wishes to charge for such pamphlets; that the Lawyers' Cooperative Publishing Company claims that in view of the provisions of the contract above referred to, the City has no right to print, publish and distribute all the City ordinances or any part thereof; that it has been the custom for years for many of the City departments to have the particular ordinances relating to their departments printed in small pamphlets for the use of their employes and the public.

I think the law must be regarded as settled that no one, neither a sovereign state nor a municipal corporation, nor the assigns of either of them, can obtain an exclusive right to the publication of statutes or ordinances, as the case may be. Since every person is chargeable with notice of the laws and liable for their violation, public policy requires that states and cities should give publicity to their enactments, and not grant to any person or set of persons a monopoly in their publication and distribution. It has been said that a compilation of the laws of a state by reason of the judgment and skill displayed in their compilation and analysis may be so original as to entitle the author to a copyright therein, but in such case, to be entitled to copyright protection the element of originality must appear in order that the author be entitled to copyright protection.

It will be noticed in the present case that the Lawyers' Cooperative Publishing Company has absolutely nothing to do with the combination or analysis of the ordinances found in the new code of 1905. The entire work was arranged and prepared by the City of Chicago at its own expense.

While it has been held that a copyright may be secured in law reports, by the proper person, so far as syllabi, statements of cases, notes, etc., are concerned, courts have universally denied that a copyright may be obtained in the opinions of the judges appearing in such law reports.

It is to be borne in mind that the so-called new code of Chicago of 1905 was adopted by the City Council in precisely its present form, after it had been set up and printed by the Lawyers' Cooperative Publishing Company. The new code is a revision. It is itself an ordinance, and the company could therefore, obtain no copyright in or to it.

I am of the opinion that any department of the City may print all or as many as it sees fit of its ordinances in pamphlet form without the consent of the company.

I beg leave to suggest that as a matter of good faith the City, after it has received the three hundred copies of the new code called for by the contract with the Lawyers' Cooperative Publishing Company, should not enter into compe-

tition with that company in the publication or sale of the new code, but in view of the long standing custom of the City of having its various departments distribute their ordinances in convenient paper form to such of the public as are interested in their enforcement, and in view also of the urgent necessity that this custom be continued, I cannot see that it is any breach of faith on the part of the City to print ordinances in pamphlet form for its various departments and their employes, and furnish them to the public.

I further think that the contract itself, when given a fair construction, may be said to permit the distribution of the ordinances in pamphlet form by the City departments.

I would recommend that you take this matter up with the Lawyers' Cooperative Publishing Company at the earliest opportunity in order that you may ascertain whether an amicable arrangement cannot be reached along the lines here suggested.

Very truly yours,
MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

In re Plan for New City Hall.

July 21, 1905.

HON. EDWARD F. DUNNE, Mayor.

My dear Sir:

Your letter of July 14, enclosing letter of W. N. Horner in regard to the construction of a new City Hall, was duly received. In accordance with your request that I write you my opinion upon the subject, I beg leave to submit my conclusions as follows:

Mr. Horner's plan contemplates that the title to the west half of Block 39 of the Original Town of Chicago, being the

premises upon which the City Hall is now located, be conveyed to a corporation, this corporation to enter into a contract with a building company to build a new City Hall contemporaneously and in harmony with the Court House building to be constructed by the County on the east half of said block, and according to the plans and specifications previously approved by the City of Chicago; said corporation then to encumber the land and the building by first mortgage to secure four per cent bonds for the contract cost of the building; the City then to enter into a lease with the corporation for a term equal to the life of the mortgage (presumably forty years); to agree in the lease to pay an annual or semi-annual rent equal to the interest on the bonds and an amount sufficient to retire one-fortieth of the bonds each year; the land and building to revert to the City or be reconveyed to it when the bonds have been paid and cancelled.

It seems to me that there are very serious difficulties in the carrying out of this plan. First, the City does not have a conveyable interest in this land. It merely has the right of possession so long as it uses it for City Hall purposes. Whenever it ceases to use it for that purpose the land reverts to the County. It may possibly be that this objection may be removed by action on the part of the County Board either conveying the land to the City in fee simple or conveying it to the proposed corporation, and Mr. Horner states to me that the County Board is so anxious to have a City Hall built at the same time with the Court House and of harmonious design therewith that he believes confirmatory action can be had from the County Board. He himself appreciates this difficulty and states frankly that he would not undertake the project unless he secured such action by the County Board.

The second difficulty, and one which seems to me to be the most serious of all, arises from the fact that the City is already indebted to the limit of indebtedness fixed by the Constitution. It may be said that the City is not incurring a debt by this transaction, but when the whole matter is taken and considered together, how can it be viewed as anything

else than an indirect means of borrowing money upon the security of the City's property. A court of equity might enjoin such a transaction on the ground that equity will not permit that to be done indirectly which cannot be done directly. Even if we pass this point and concede that the City does not, in the usual acceptance of the term, incur an indebtedness, yet in the sense of that term as defined by our Supreme Court in the *Joliet Water Works* case, if by means of the execution of a mortgage the City is put in a place where it *may* be deprived of existing property by the foreclosure of such mortgage, such a transaction is, within the meaning of the law, the incurring of an indebtedness. (*City of Joliet v. Alexander*, 194 Ill. 457.)

All of these objections are of much more concern to the promoters of the project than to the City, and perhaps it may be well said that, if the investors are willing to risk their money on the moral certainty that the City of Chicago would not repudiate the payment of such a debt of honor on mere technicalities, and would themselves undertake in advance the bringing of test suits to determine these questions, the City should permit the taking of the risks by the investors and contractors.

I might suggest a change in the detail of Mr. Horner's plan, which would, I think, tend to protect the City; namely, instead of making this arrangement with a corporation organized under the General Incorporation Act, the arrangement might I think be more safely made with a corporation organized under the provisions of the law authorizing the organization of corporations *not for profit*, the City to have representation on the Board of Trustees, and the corporation, by its articles of association, to be given a trust relation to the City. I think this modification of Mr. Horner's plan would even tend to meet some of the legal difficulties which I have discussed, and while the working out of the details may be difficult, I am not prepared to say that with such a corporation a plan might not be worked out which would be capable of legal consummation. Indeed, I am inclined to think that, if both the City and the County should

convey to such a corporation the site of the City Hall, and this corporation should then make its mortgage, the courts might hold that this was not the creation of a debt by the City. At least it is the most promising method which I can conceive of and is I think worth consideration and experiment.

Very respectfully,

EDGAR B. TOLMAN,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Pleasure Driveway in Washington Heights.

July 24, 1905.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

I have your communication of recent date requesting the opinion of this department as to whether by an ordinance, a draft of which is submitted by you, a street designated by the town of Washington Heights before annexation as a pleasure driveway, would, on account of the annexation of the town of Washington Heights to this City, come under the jurisdiction of this municipality and subject to the prohibition of the ordinance as to teaming upon this thoroughfare.

An act entitled "An act to provide for pleasure driveways in incorporated cities, villages and towns (approved and in force March 27, 1889)" authorizes city councils and boards of trustees to designate by ordinance, not to exceed two streets, to be used for pleasure driving only, and provides that the corporate authorities may, by ordinance, regulate the speed of travel upon said pleasure drives; the kind of vehicles that shall be allowed upon the same, and exclude

funeral processions, business traffic or objectionable travel, and prescribe fines or penalties for the violation of the ordinance. This statute has been decided by the Supreme Court of Illinois to be constitutional. (*Cicero Lumber Co. v. Cicero*, 176 Ill. 19; see also *City of Chicago v. Larned*, 203 Ill. 290.)

The ordinance submitted with your letter seems to be in accordance with this statute, and if the Village of Washington Heights had not, prior to November 10, 1890, designated by ordinance more than one other street as a pleasure driveway the Chief of Police of this City is vested with power to enforce the ordinance, since the old ordinance of Washington Heights, in my opinion, is kept in force upon annexation to this City in the event of there being no counter-vailing legislation on the part of this municipality.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Duty of Railroad Companies to Maintain and Repair Subways and Approaches.

July 24, 1905.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

I have a communication from you of recent date requesting the opinion of this department as to the liability of the Chicago & Northwestern Railway Company to maintain or make repairs to subways. In the communication attached to yours from W. D. Cantillon, general superintendent of the railroad, he states that the ordinance for track elevation on the Wisconsin Division, from Chicago avenue to Mayfair, does not contain any specific provision

requiring the railway company to be responsible for the maintenance of the paving in the subways in that district.

This is totally beside the question. The company is under a statutory and common law obligation to maintain the pavements of approaches to its viaducts or subways. This has been the uniform opinion of this department in many communications to the Commissioner of Public Works upon this subject, more particularly in regard to the 51st street viaduct of the Illinois Central Railroad Company, to which opinion upon this subject I respectfully refer you.

Subways and their approaches are rendered necessary by the increased travel upon the public thoroughfares crossed by the railroad tracks, as well as by the increased traffic upon said tracks. The public welfare of the citizen, and his right to have the railway crossing maintained in a safe condition for travel at all times is guaranteed by the statute law. Under its police power the City has required track elevation, and as a part of the scheme of such elevation the various ordinances provide for subways, and in order to relieve the railroad companies of burdens which might be too onerous, certain streets are always closed in order that subways may not be required at every street crossing of the railroad track. All this is the result of the maintenance and operation of a railroad track across a public street. Were there no such maintenance and operation no such precautions for public safety would be required. They result from the acts of the railroad company in laying tracks and operating trains upon the same. The benefits from the operation of trains upon railroad tracks accrue to the corporations themselves, and in return for such benefits they assume certain obligations, among which is the duty of keeping crossings safe at all times for persons desiring to cross the same by means of public highways.

The duty of maintaining a subway in good repair is exactly the same as would be the duty of maintaining the crossing at grade in good repair, and, as I have above stated, this duty is, both by statute and common law cast upon the railroad company and cannot be avoided merely because

there happens to be no specific provision for such maintenance in the ordinance requiring track elevation.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Application to Erect Pier at 31st Street.

July 24, 1905.

JOSEPH M. PATTERSON, ESQ., Commissioner of Public Works.

Dear Sir:

I am in receipt of your communication of recent date requesting the opinion of this department as to whether you can legally issue a permit to Fred B. McLean to build a promenade pier in Lake Michigan at and in prolongation of 31st street. The dimensions of the pier sought to be constructed are—length, 4,000 feet; width, 60 feet at narrowest point and 300 feet at the widest point; said pier to be 20 feet above water, mean lake level. The uses to which the pier is to be devoted are, dancing, musical and theatrical entertainment and for dockage purposes for steamers, yachts and other craft.

It is claimed by the applicant that the construction of this pier will in nowise interfere with navigation upon the waters of Lake Michigan, and the attached communication from Lieut. Col. Bixby, Engineer Corps, states that a request by the applicant has been made to him for the views of his department respecting the permit, concerning which he intends shortly to make a request from the Secretary of War.

Under the common law the title to the soil of the sea or the arms thereof below ordinary high water mark was

in the sovereign. The common law of England is the law of this country upon this question. The rights which are vested in the sovereign in England in this country reside in the state, unless committed to the care and custody of others, as in the case of certain park boards.

Under the common law any structure placed upon the land of the state below or beyond the waters' edge in the waters of the lake is a purpresture or an encroachment on the public waters.

In a recent opinion this department, speaking through Assistant Corporation Counsel Wm. H. Sexton, held that the City was in a sense the agent of the State in protecting the submerged lands beyond the shore line against encroachments in the nature of piers and wharves, and that until the State had signified its consent to the erection or construction of piers in the waters of Lake Michigan beyond the shore line, the City was without power to consent to such erection or construction. It is true that the owners of lands exposed to the inroads of inland waters may erect walls and embankments to prevent the wearing away of the land, or to protect them from overflow, but beyond this the submerged lands are to be maintained free from all encroachments.

In the case of *Gordon v. Winston*, 181 Ill. 338, which was a case arising over the attempt of the appellant to place upon the submerged lands of Lake Michigan, below the water line, a certain box pier, beyond the shore line of Lincoln Park, the court say:

“The submerged land upon which the piers were located was the property of the State, granted to appellees in trust for park purposes, and it is clear they had the right to enjoin any acts on the part of appellant which tended to encroach upon the public domain and gradually appropriate such property to his own use.”

There is no intention, apparently, in the present case to appropriate any property to the use of the applicant for the permit, but I regard the building of the pier in question as an encroachment upon the property of the State which you should not sanction without express authority from the

State. In my judgment the application for the permit should be denied.

Yours respectfully,

JOHN W. BECKWITH,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

**Title to Alley Between 67th and 68th Streets and
Parnell Avenue and Wallace Street.**

August 2, 1905.

WILLIAM E. Dever, Esq., Chairman Committee on Track
Elevation.

Dear Sir:

Sometime ago a subcommittee of your committee, brought to this department the correspondence concerning an alley between 67th and 68th streets and Parnell avenue and Wallace street, and requested an opinion as to whether or not this alley was legally closed.

In reply thereto I beg to say that the plat of the subdivision of which this alley was a part, was recorded on June 25, 1880, and is known as the E. L. Bates' resubdivision of the northeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 21 38—14 (Plat Book 15, p. 27). The alley in question abuts on the west side of block 3, which block is 180 feet wide; the alley is 20 feet wide, and to the west of the alley is block 4, which is only 33 feet wide.

Under date of June 18, 1880, Samuel S. Gregory, the surveyor, certifies as follows: "I hereby certify that I have surveyed the northeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 21, town 38 north, range 14 * * * and that I have subdivided the same into blocks, lots, streets, and alleys, all of which is correctly represented on the above plat."

The following reservation is shown on the plat, and signed "Emory L. Bates." "I hereby reserve for myself, heirs and assigns, the right to use the alley between blocks 3 and 4 above shown for the purpose of repairing or altering the artesian well on said block 4, and for free access to said well, and also to reserve the right to lay pipes in said alley connecting with said well." Then follows an acknowledgment of the plat by Emory L. Bates before Manning Leonard, a notary public of Worcester County, Massachusetts; also the certificate of Edward Byrne, town clerk of the Town of Lake, that this plat was approved by the board of trustees of the town June 25, 1880.

Marked on the plat are the numbers of the blocks, names of the streets, alleys, their width, etc.

I am of the opinion that the plat constitutes a statutory dedication, and that the title to this alley became vested in the Town of Lake. It was used by the public as such, I am informed, until March 13, 1893, when the Chicago and Western Indiana Railway Company sought to vacate it by an instrument filed for record on that date (Book 2841, p. 388). This was done apparently on the theory that as the company owned all the land fronting on this alley, it had the power to vacate it. I am informed that since the date last mentioned, this company has taken exclusive possession of the alley by extending its right of way in this block to a considerable distance east of the alley and upon land which it now owns.

On May 23, 1904, p. 2977 of the proceedings, the Council, on motion of Alderman Badenoch, passed an order instructing the commissioner of public works to direct said railroad company to open this alley, and on June 6, 1904, on complaint of President Thomas of the company, the matter was referred to the committee on track elevation.

It is hardly necessary to say that the attempt on the part of the railway company to thus vacate a public highway is ineffective. So far as the City of Chicago is concerned this strip of land still belongs to it, in trust for the use

of the public as a highway, notwithstanding the company has extended its right of way so as to cover this land.

I was informed the company also claims that this alley was vacated by the Council by the passage of the track elevation ordinance on October 23, 1899. This is a misapprehension. Section 9 of the ordinance (p. 1424), contains the provision in question, and reads in part as follows:

“Any and all portions of any streets, alleys or avenues extending into or across any of said lines of railway * * * shall be and the same are hereby discontinued and vacated under the elevated roadbeds and tracks in this ordinance described. * * *”

This alley is not one “extending into or across” this railway, and is therefore not embraced within the section mentioned. It runs longitudinally with the railway right of way.

By the instrument purporting to vacate this alley, and by the letter of President Thomas to the City Council on June 6, 1904, page 405 of the proceedings, it is clear that the company recognized the existence of this alley up to March 13, 1893.

I am therefore of the opinion that the alley has not been legally closed and that the Western Indiana Railway Company is a trespasser on this land.

Yours truly,
MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Exemption of City Property From Taxation.

August 4, 1905.

CHAS. MITCHELL, ESQ., City Real Estate Agent.

Dear Sir:

I am advised by the Comptroller's office that the property known as Lots 32 and 33 in Block 2 in A. Crane's subdivision of the Southeast quarter of the West quarter of the Southwest quarter of Section 28, Township 39 North, Range 14, which property is located on Halsted street between 28th and 29th streets, and on which is located the building known as "The Fourth Ward Bath" owned by the City of Chicago was not marked exempt on the tax books and taxes were assessed against it for the year 1904 and previous years. The same is true as to the property known as Lots 17 and 18 in Block 6 in S. E. Gross' subdivision of the Southwest quarter of the Southwest quarter of Section 5, Township 38 North, Range 14, located on Gross avenue near 47th street, on which is the building known as "Public Bath No. 3," owned by the City of Chicago. The same is true of the property known as the South one-half of Lot 13 in Block 2 in Duncan's Addition to Chicago, located on Peoria street 175 feet South of Madison street, on which is situated the building known as "The R. A. Waller Bath" owned by the City of Chicago.

These premises should be marked exempt on the tax books under the provisions of paragraph 9 of Section 2 of "An Act for the Assessment of Property and for the levy and Collection of Taxes," in force July 1, 1872 (Chapter 120, Hurd's Revised Statutes of Illinois, 1903), commonly known as "The Revenue Act," which provides that the following among other property shall be exempt from taxation:

"Ninth. All market houses, public squares or other public grounds used exclusively for public purposes. All works, machinery and fixtures belonging exclusively to any town, village or city, and used exclusively for conveying water to such town, village or city."

And also under the provisions of Section 3 of Article 9 of the Constitution of Illinois.

Will you kindly take up the matter at once with Mr. Fish of the Comptroller's office or myself, and go before the Board of Assessors, or if too late, the Board of Review and have the said premises marked "exempt" on the tax books if the same has not already been done?

Very truly yours,

WM. H. SEXTON,

First Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

"City of Traverse" — Gambling in Waters of Lake Michigan.

August 8, 1905.

HON. JAS. HAMILTON LEWIS, Corporation Counsel.

Dear Sir:

I desire to submit my report as to the disposition made of the cases which came up for trial before Justice Callahan, sitting as Police Magistrate in the South Chicago Police station this morning at 9 o'clock a. m. The facts are briefly as follows:

Thursday afternoon Inspector Nicholas Hunt, Lieutenant Jenkins of the South Chicago Police station and officers attached to their command, arrested fourteen persons who landed in South Chicago from the small launch which makes trips back and forth from South Chicago to the Government pier, and which also for the last few days has been transporting persons to and from the steamer "City of Traverse" which has recently been devoted to gambling purposes. The persons arrested were charged with violation of Section 1454 of the Revised Code of 1905. The prosecutions were brought at the direction of Superintendent of Police Collins. The following are the facts as developed by the evidence:

The "City of Traverse" was anchored almost all of Thursday afternoon last in Indiana waters and not in Illinois waters; furthermore, no gambling was conducted on the boat on that day because of some defect in the apparatus used for receiving intelligence from the race tracks. Of the persons arrested only one was identified as having been present at all on the "City of Traverse." The testimony showed that the persons were not guilty of disorderly conduct, but were arrested as soon as they had left the small launch above referred to. On this showing I consented to a dismissal of all the cases except that against the man Singer, who was the person identified as having been present on the steamer "City of Traverse." Assistant Superintendent Schuettler, who was present, however, desired that the case be continued a week in order to permit him to secure further evidence.

I would suggest that Superintendent Collins be advised to discontinue this kind of prosecution. It is perfectly clear, it seems to me, that the City of Chicago cannot punish persons who may gamble in waters which are under the jurisdiction of the State of Illinois because they are more than three miles from shore, or who gamble in waters of another State. In the former case, such acts are covered by the laws of the State of Illinois and should be dealt with by the office of the State's Attorney. In the latter case, neither the City of Chicago nor State of Illinois has any jurisdiction. I think, however, that if the City detectives identify any person as being "touts," "cappers," or common gamblers, who are without any means of livelihood, such persons may be arrested within the limits of the City of Chicago and prosecuted under Sections 1454 and 1476, as vagrants. This is the limit, in my opinion, to which the City authorities can and should go.

Very respectfully,
 MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:
 JAMES HAMILTON LEWIS,
Corporation Counsel.

Interpretation of Sections of Code Regulating Livery Stable Licenses.

August 11, 1905.

JOHN E. TRAEGER, ESQ., City Collector.

Dear Sir:

We have your letter asking for an opinion upon Sections 2367 to 2377 of the Revised Code, particularly with reference to your right to require undertakers and the keepers of boarding stables to take out livery stable license.

It seems very clear from these sections, that every person who keeps a place where he boards horses belonging to another, or keeps horses that he hires to another, is a person required by the ordinances to take out a livery stable license. Whoever keeps a place in which are boarded horses, or in which five vehicles, or less than that number are kept for hire, is required to pay a fee of \$25.00 per annum. If more than five vehicles are kept then an additional fee is provided for by the ordinance.

If any undertaker, or a person engaged in any other business, furnishes vehicles for hire, he is required by the ordinance to take out a livery stable license. The fact that he may charge a lump sum for his services without specifying the amount charged for the vehicle, does not relieve him from this obligation.

Yours truly,
W. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Order of City Council Does Not Repeal an Ordinance.

August 17, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

Your letter of August 10th referring to this department a communication from the Superintendent of the Bureau of Maps concerning the renumbering of houses on Dearborn avenue between Schiller street and Burton place was referred to me for an opinion. It seems as though an ordinance was passed by the City Council on July 14, 1904, requiring that new numbers be assigned to certain houses in accordance with plat prepared for that purpose; that later on, when your department undertook to enforce this ordinance, an order was passed by the Council directing you to stay the enforcement of same, and your inquiry now is whether the original ordinance was a valid ordinance, and whether it is now in force or is superseded by the stay order.

The original ordinance is valid and now in force. It was within the power of the Council to pass such an ordinance, and it was duly approved. The ordinance provided that it should be in force and effect "from and after its passage and approval." It did not, in fact, go into effect until it was published, but when it appeared in the Council proceedings it went into effect.

The stay order was simply a resolution introduced and passed by the Council December 12, 1904. Such a resolution cannot in effect repeal an ordinance. Our Supreme Court in the case of *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 445, says:

"But an ordinance cannot be amended, repealed or suspended by a resolution. The act which amends, modifies or repeals a law should be of equal dignity with the act which enacts or establishes the law."

There are numerous other authorities which could be cited to the same effect, among which are the following:

City of Joliet v. Petty, 96 Ill. App. 450.

Backhaus v. People, 87 Ill. App. 173.

Hibbard et al. v. City of Chicago, 173 Ill. 91.

Galt v. City of Chicago, 174 Ill. 605.

I therefore give it as my opinion that the resolution which in effect repeals the ordinance is not valid, and that the original ordinance is in force.

I beg to call your attention to Section 2119 of the Revised Municipal Code of 1905, which provides that houses shall be re-numbered only during certain months of the year. It would therefore not be proper to enforce this ordinance until next December.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Legality of Issuing Permit to Construct or Put in Material on Elevated Structure to Deaden Noise.

August 22, 1905.

HON. JOSEPH MEDILL PATTERSON, Commissioner of Public Works.

Dear Sir:

I have your communication of the 21st inst. requesting the opinion of this department as to whether you may legally issue a permit to the Northwestern Elevated Railroad Company to put in gravel and deadening material in an elevated roadbed on their structure, between Jackson boulevard and Monroe street on Wabash avenue in the City, as shown by blue print T 1001 on file in your office.

The authority for the issuance of this permit is found in an order of the City Council, passed June 12, 1905. (Current Council Proceedings, page 553.) Provided the bond mentioned in the order has been duly filed, and the sureties thereon approved, as required by the order, I am of the opinion that you may issue a permit for this work in the regular form, inserting therein a stipulation "that nothing herein contained shall affect in any manner the rights or contentions of either party in the suit of the *Northwestern Elevated Railroad Company v. The City of Chicago, et al.*, cause number 244,799 now pending in the Circuit Court of Cook County, or in any other litigation that has arisen or may arise between these parties; nor shall it be considered an acquiescence by the City of Chicago in any claim made by said railroad company, or any other elevated railroad company as to the validity of the rights alleged to have been granted under any ordinance of said City to construct or maintain a system of elevated railroad known and herein referred to as 'the 'Union Loop.' "

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Representatives of Foreign Nations Not Required to Procure Licenses.

August 24, 1905.

A. C. ANSON, ESQ., City Clerk.

Dear Sir:

The communication of the acting French Consul addressed to the Mayor, bearing date the 20th inst., has been referred to me for reply.

The request of the acting French Consul is that he be furnished free licenses for four dogs belonging to himself and to the secretary of the French Consul.

Dog licenses are not taxes, but result from an exercise of the police power, and I do not think, as a matter of law, the request can be granted, but if in the exercise of your discretion you deem it wise, on the ground of courtesy to the representatives of a foreign nation, to exempt the applicants from dog license fees, I can see no objection to it. I believe such exceptions have before been made in the cases of foreign representatives stationed in Chicago.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Repairing Water Meter at Sisters of Mercy Hospital; Liability for Such Repairs.

August 24, 1905.

GUY CRAMER, ESQ., Secretary to the Mayor.

Dear Sir:

I have your favor of the 22d inst. relating to the request of the Sisters of Mercy Hospital, 2541 Prairie avenue, that a bill rendered against them by the City for meter repairs be canceled. I have also examined the bill attached to your communication, which I return herewith.

Water rates or charges are merely compensation for a commodity supplied by the City in its private capacity as a municipal corporation. I am of the opinion that the City of Chicago has no right to compel water consumers to pay the cost for keeping the meters in repair. If the bill in question is merely for repairs necessitated by the ordinary wear and tear upon the meters, I think the bill should be

remitted. If the repairs were necessitated, however, by injuries to the meter resulting from negligence of the Sisters of Mercy Hospital, or their employes, they may be liable.

Section 2423 of the Revised Municipal Code of Chicago of 1905, which relates to repairs to water meters contains the following provision:

“Such meter shall be supplied and installed * * * at the expense of the consumer. * * * After installation such meter shall be under the sole control of the department of public works and the expense of any replacement thereof or repairs thereto shall be borne by the City without further cost to the consumer or persons owning or in possession, charge or control of such premises.”

I think the bill should therefore be remitted, whether the repairs were made before or since the Code of 1905 went into effect, unless the repairs were necessitated by acts of the hospital.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

**Bond for Sidewalk Space at Custom House Place;
Protest of Shea Smith & Co. Against Signing
Bond in Form Presented.**

August 29, 1905.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

The communication from Shea Smith & Co. relating to signing of the bond to cover permit for vault under sidewalk at 18 and 20 Custom House place was referred to me for an opinion. This firm's letter states that they object to

signing the bond that you have presented to them for signature, owing to the fact that by so doing they will assume the City's liability under the State laws on account of the condition of the sidewalk.

The bond which you have prepared is in strict conformity with the sections of the code relating to same, namely, 2096-2109, and cannot be varied. The question which this firm therefore raises is practically whether or not these sections of the code are valid. The question of the right of the municipality to rent space underneath sidewalks has been repeatedly passed on by our courts. It was upheld in *Gregsten v. City of Chicago*, 145 Ill. 451; in *City of Chicago v. Norton Milling Company*, 196 Ill. 587, and in other decisions of the Supreme and Appellate Courts.

It is true that a portion of the liability of the City is assumed by the owner of the abutting property, but this is part of the compensation which such owner pays. I am of the opinion that this firm is magnifying this liability to a great extent.

Our Supreme Court in the case of *West Chicago Masonic Association v. Cohn*, 192 Ill. 210, says:

"If, however, such abutting property owner, or other person so making the excavation in or under the sidewalk of a public street, has authority or license from the proper City authorities so to do, and the work is not inherently, in nature and character, a nuisance, the licensee is liable only in the event he fails to use ordinary care and diligence in constructing the excavation and keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk."

A person injured by reason of a defective sidewalk has his remedy against the City; the City, however, can recover over from the party whose negligence caused the injury.

Chicago v. Robbins, 67 U. S. 418.

It is not possible, however, for the City to recover unless there is actual negligence. In any event, it is not possible for you to change the form of the bond, and this firm

must either accept the permit under conditions prescribed by the code and sign the bond or else vacate the space.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Power of Mayor to Remit a Fine Imposed for Violation of Ordinance.

September 1, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

On January 5, 1905, City Prosecutor Taylor rendered an opinion to former Mayor Harrison on the question of the power of the Mayor to remit a fine imposed for violating a City ordinance, regardless of whether the time for an appeal has passed. As the opinion is apparently at variance with the opinions of this department, the matter was referred here for attention. The opinion holds that the Mayor has the power to remit fines at any time, under authority of the following ordinance, passed September 27, 1897, page 638 of the Council Proceedings:

“That the Mayor of the City of Chicago shall have the power and authority, and such power and authority is hereby vested in, and delegated to, said Mayor to remit, release and discharge, at his discretion, any fine or fines which may hereafter be imposed upon any person or persons for the violation of any City ordinance; provided, however, that in each and every case in which such remission or release, of any fine imposed shall be so made by the Mayor, he shall cause a proper record thereof to be made and notification of such remission to be sent to the City Comptroller.”

The opinion rendered by this department on August 5, 1897, holds that “Neither the Mayor nor Comptroller has

authority to release or remit fines''; the opinion of April 28, 1904, holds that a justice of the peace or police magistrate has no power to remit fines imposed for violation of a City ordinance; but that pending the expiration of the time for an appeal, the City Council may remit such fines,—citing *City of Lewiston v. Hummel*, 38 Ill. App. 326; *Agnew v. Brall*, 124 Ill. 312.

These two authorities hold that as the time for an appeal had not expired, the matter was still a pending controversy and could be adjusted by the proper authority. The case of the *Town of Petersburg v. Mappin*, 14 Ill. 194, is to the same effect. In addition, the case of the *City of Newton v. Bergbower*, 63 Ill. App. 202, denies the power of the Mayor to remit or release a judgment, which he had attempted to do of his own motion. None of the foregoing cases touches the question of the power of the City after the time for an appeal has expired.

The City Prosecutor's opinion further holds that the above cases furnish no criterion of the power of the City of Chicago in such matters; that its power is to be determined from the present general Incorporation Act and such parts of the former charter as are not in conflict with the present one; and that by virtue of Section 6 of Article 1 of the general Incorporation Act the provision contained in the special charter in respect to the remission of fines is continued in force. The language of said Section 6 is, in part, as follows:

“* * * from the time of such organization, or change of organization, the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place.”

The old charter provision concerning the remission of fines is contained in Section 7 of Chapter 13 on the establishment and maintenance of Police Courts, and is as follows:

"Neither the Mayor or Common Council shall remit any fine or penalty imposed upon any person for the violation of the laws or ordinances of said City, unless two-thirds of all the aldermen authorized to be elected, shall vote for such release or remission; but the Mayor shall be authorized, in his discretion to release from imprisonment any person committed to the bridewell or house of correction, or county jail, for a violation of the ordinances of said City, by virtue of the judgment of said police court."

Section 9 of Article 2 of the general Incorporation Act authorizes the Mayor to release prisoners, and is as follows:

"He may release any person imprisoned for violation of any City ordinance, and shall report such release, with the cause thereof, to the Council at its first session thereafter."

It will be observed that this provision of the present charter is a part of said Section 7 of the former charter.

At first blush, the view of the City Prosecutor seems plausible, yet I am of the opinion that a fair construction of the present act and amendments thereto, when taken in connection with said Section 6, does not sustain the reasons advanced by him. Doubtless, all that was intended by the Legislature in the enactment of the general Incorporation Law, with reference to remitting fines or releasing prisoners, was to give the Mayor power to release prisoners, and to take from the Mayor and the Council the express power to remit fines. As was said in the case of *City of Cairo v. Bross*, 101 Ill. 481:

"In short, we are of the opinion that it was the object of the Legislature, in adopting the general Incorporation Law, to place all cities, towns and villages, organized under it and of the same grade, upon a uniform and common footing, with respect to their corporate powers and the manner of exercising them."

In discussing this principle, in the case of *Law, et al. v. People, et al.*, 87 Ill. 402, the Supreme Court also said:

"It is not claimed that the general law, under which the City is acting, confers power to levy a tax to provide a fund to entertain official visitors of the City, but

it is contended that the amendment to the former charter, approved the 9th of March, 1867 (Private Laws, Vol. 1, p. 771), does, in terms, confer the power; and inasmuch as that provision is not repugnant to the present charter, by force of the sixth section of the general law the power may be lawfully exercised. That section provides that all laws and parts of laws not inconsistent with the general law, shall continue in force and be applicable to any city or village adopting the general law, the same as though the change of organization had not taken place. Is, then, that amendment continued in force? We, from the language employed, can only suppose that all laws and parts of laws conferring ordinary corporate powers were intended to be preserved, and not such as were unusual or extra corporate powers. This power, it is believed, is seldom conferred on municipalities, and, in the very nature of things, can not be held a necessary or proper corporate power. We are at a loss to perceive in what manner its exercise can be conducive to the well being of the inhabitants of the City, or it could in the slightest degree advance their prosperity, or protect them in any of their rights, or promote and advance morality or good order."

Section 1 of Chapter 13 of the old charter provided as follows:

"The Common Council shall * * * designate two or more justices of the peace in said City, who shall have exclusive jurisdiction, as justices of the peace for two years, or until their successors shall be appointed, in all actions for the recovery of any fine or penalty under the laws of said City and all ordinances, by-laws or police regulations thereof. * * *"

It will be seen from the following provisions of the general Incorporation Act, that the former charter provisions regarding police courts, as evidenced above, have been repealed.

Section 1 of Article 2 of the Act of June 26, 1895, revising the law in relation to justices of the peace and constables, gives a justice of the peace jurisdiction in the following case, among others:

"*Seventh.* In all actions arising under the law for the incorporating of cities, towns and villages, or any

ordinance passed in pursuance thereof, where the amount claimed does not exceed two hundred dollars." (2 Starr & Curtis, p. 2409.)

In the City and Village Incorporation Act (Sec. 8, Art. 5), it is provided:

"Any and all justices of the peace or police magistrates shall have jurisdiction in all cases arising under the provisions of this act or any ordinance passed in pursuance thereof." (*Ibid.* 720.)

Section 1 of the Act of April 12, 1897, providing for the punishment of persons violating any of the ordinances of the several villages and cities in this State, is in part as follows:

"That in all actions for the violation of any ordinance of any city or village, organized under any general or special law of this State, the first process shall be a summons: * * * any person upon whom a fine or penalty shall be imposed may upon the order of the court or magistrate before whom the conviction is had be committed to the county jail or the calaboose, city prison, work house, house of correction, or other place provided by such city or village by ordinance for the incarceration of offenders, until such fine, penalty and costs shall be paid: * * * (*Ibid.* 184.)

The said act (Sec. 6, Art. 5) also provides that:

"All fines and forfeitures for the violation of ordinances, when collected, and all moneys collected for licenses or otherwise, shall be paid into the treasury of the corporation, at such times and in such manner as may be prescribed by ordinance." (*Ibid.* 720.)

I am of the opinion that in the foregoing provisions, we find an inconsistency with said Section 7 of the old charter, and that the latter is not now in force; and in so far as the City Prosecutor's opinion holds that the Mayor has authority under the charter and ordinance to remit a fine or release a judgment at any time, I must dissent therefrom.

However, notwithstanding the implied repeal of said Section 7 by the incorporation of the City under the general law, I am of the opinion that the Mayor may be granted power, under a proper ordinance, not only to remit fines in

a pending controversy, but to compromise judgments imposed for the violation of a city ordinance after the time for an appeal or for suing out a writ of error has expired. Such power must necessarily be lodged either in the City Council or in one of the executive departments. If not, the City would be without power adequately to control its litigation.

While it is self evident that neither the Council nor an officer of the City may give away its property either before or after a judgment, it is also clear that the Council may designate an officer and invest him with the power to settle and adjust judgments in its favor, regardless of their age.

In the case of *Town of Petersburg v. Mappin, supra*, speaking of the power of the trustees, the court said:

“The power to prosecute suits on behalf of the corporation includes the power to settle the same. So the power to defend suits brought against the corporation gives them the same power of adjustment. They may compromise doubtful controversies to which the corporation is a party, either as plaintiff or defendant. The law vests them with a discretion in such matters, which they are to exercise for the best interests of the corporation. A settlement of an existing controversy if made in good faith binds the corporation; but if collusively made it is not obligatory. In the present case, the trustees had authority to grant the license and take the bond. On a forfeiture of the obligation they could sue and recover the penalty. They might decline to pursue that course, if satisfied that no benefit would accrue to the town by so doing. They could compromise the matter by receiving less than the penalty, if they considered the result of a suit upon the bond doubtful or the collection of a judgment against the obligors uncertain.
* * * It is not pretended but that the trustees acted in good faith, and with the view of promoting the best interests of the town. In adjusting the controversy they were acting strictly within the scope of their authority. Whether the arrangement was a judicious one is not the question. A mere error of judgment will not vitiate the settlement.”

In *Agnew, et al. v. Brall, et al., supra*, it is said:

“The City Council have no power to sell or in any manner dispose of the property of the corporation with-

out consideration, and, in our opinion, they have no right to discharge a debt without payment which may be held against parties who are solvent and responsible, where no controversy exists as to the validity and binding effect of the indebtedness. But a municipal corporation has power to settle disputed claims against it. (Dillon on Mun. Corp., Sec. 398.) It may prosecute suits in favor of the corporation and defend actions brought against it. It may sue and be sued and the right to settle matters in litigation follows logically from the right to maintain or defend actions."

In the case of *City of Shawneetown v. Baker*, 85 Ill. 564, the court said:

"As a general proposition, municipal corporations have the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and, when the amount is ascertained to pay the same, as other indebtedness."

In the case of *State ex rel. Fuller v. Martin*, 27 Neb. 455, it is said:

"While I am not aware that express authority is given to cities or to the Mayor and Council, as legislators, to settle claims of this nature by compromise, yet the power of settlement and adjustment, must be held to exist and to grow out of their general corporate powers and the absolute necessities of the case."

In the case of *Prout v. Pittsfield Fire Dist.*, 154 Mass. 451, the court said:

"The general power to compromise doubtful and disputed claims is necessarily incident to the power to sue and the liability to be sued. If a claim against the defendant cannot be adjusted by way of compromise, neither could a claim in its favor. If this doctrine were applied generally to all claims, the result would be that in all disputed cases the defendant must perforce engage in a litigation, the expense of which would be certain, but the result doubtful. The defendant would be under the necessity of insisting at all hazards upon a judicial determination of all its controverted rights and would be bound to pursue or resist all doubtful claims until final adjudication by the court of last resort."

It seems a different conclusion was reached in *Town of Butternut v. O'Malley et al.*, 50 Wis. 331, wherein the court said:

“The owner of a judgment may undoubtedly discharge it upon the payment of any consideration, or without any payment whatever. But not so with the board, who do not own the judgment, are merely agents of the town, charged with the duty of attending to its affairs, and have no right to give away its property to any one. The question as to the amount the treasurer owes the town is not open to inquiry; for the judgment is final and conclusive upon that point. What right, then, has the town board to make a compromise about the judgment; to make a settlement, and agree to receive less than the sum adjudged the town? It is not claimed that the full judgment cannot be collected. If the board can, by way of settlement, allow the treasurer credit in rebate thereof for sums which were disallowed by the court, they may discharge the whole judgment, without any payment, if they deem the judgment unjust.”

In view of the charter powers of the City of Chicago, I am of the opinion that the proposition stated in this Wisconsin case is not a criterion here.

From the foregoing Illinois authorities it appears that the power to release judgments outright is limited to the time within which an appeal may be taken; and, inferentially, it may not be done thereafter. I am of the opinion, however, that for the same reason judgments may be released outright within the time allowed for suing out a writ of error—for instance, in the case of judgments entered in the Criminal Court on appeal from justices of the peace or police magistrates. I am of the opinion, also, that such judgments may be released at any time, through settlement or compromise. Obviously, many cases may arise where a judgment debtor may be unable to pay the full amount, or where his assets could not be reached by execution. Because fraud might be practiced in such cases is no reason why the principle should be rejected. There should be no difficulty in applying this principle to the facts in every case as they arise. If pending the time for an appeal, the City may compromise a

claim to the extent of remitting the fine, I can see no good reason why it may not compromise at any time. There is no charter restriction upon its power to do so.

The ordinance of September 27, 1897, is, in my opinion, invalid, in that it attempts to empower the Mayor to remit any fine at any time. In view of the fact that this ordinance has been purposely omitted from the present code, and has, consequently, been repealed, I have prepared and submit herewith another ordinance authorizing the Mayor, at his discretion, to remit a fine within the time an appeal may be taken or a writ of error sued out; and, after such time, authorizing him to settle and compromise such judgments upon such a consideration as he may, in his discretion, deem sufficient.

Yours very truly,
MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
First Asst. Corporation Counsel.

Maintenance of Stand at Lake Avenue and 75th Street.

September 12, 1905.

MR. M. J. DOHERTY, Superintendent of Streets.

Dear Sir:

I have your communication, transmitting letter from F. C. Vierling relative to his right to maintain stands at the northeast corner of 75th street and Lake avenue. The contentions advanced in Mr. Vierling's communication may be stated as follows:

First. That his stands do not project over 75th street but do project from one to five feet over the waters of Lake Michigan; that Lake avenue at this point is entirely submerged land; that at the time of the purchase of the property occupied by the stands by Mr. Vierling in 1891, there

was no land whatever east of the west line of Lake avenue, and the land between 75th street and Lake avenue east of said west line has been formed by accretions.

The whole question of the City's title to the submerged land formerly known as Lake avenue is now in litigation in the suit of *Westphal v. Hetherington* in the Circuit Court of this County, and it is the contention of the City that Lake avenue, immediately north of 75th street is a public thoroughfare and that no obstruction may be maintained thereon. This same property owner at one time constructed and maintained a toboggan on Lake avenue immediately north of 75th street and was directed to remove the same by the then Commissioner of Public Works, September 16, 1903. I do not think that the contention of Mr. Vierling that the land north of 75th street is an accretion can be successfully maintained; the fact in this instance being that all of Lake avenue in the south shore division (lot 180) has been washed away except the portion of said street lying north of 75th street and extending north thereof about three hundred feet. Old residents of this locality claim that the waters of the lake have never disturbed this strip of land immediately north of 75th street.

In view of the foregoing, I am of the opinion that the contention of Mr. Vierling as stated in his communication, is incorrect.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Protests Against Renewal of Dramshop License.

September 14, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

In reply to your verbal communication requesting a further and supplementary opinion to the one rendered September 12th, respecting protests against dramshop-keepers' licenses in the old Town of Hyde Park, the questions upon which you desire additional information are, as I understand the case, first, does the protest mentioned in Section 1 of an ordinance governing the issuing of saloon licenses in the Village of Hyde Park have reference to a written protest to be filed with the Comptroller (now the City Clerk), or is a verbal protest sufficient?

Second, Must a legal protest be filed within thirty days prior to the time for the renewal of such license in order to impose upon the dramshop-keeper the necessity of a new petition?

Third, What constitutes a legal protest under the section above referred to?

Fourth, Under the facts before you, in the case of the application of one Ripley to maintain a dramshop at 932 East 51st street, should a license be issued, said Ripley having heretofore obtained a license for the last license period, and no written protest having been filed with the license officer thirty days prior to the commencement of the next license period?

First. The ordinance above referred to provides, in so far as it is material to be quoted:

"Section 1: Any person who shall desire to obtain a license to keep a saloon or dram-shop shall in addition to the requirements now provided by ordinance, present his application in writing to the Village Comptroller for such license, in which shall be stated the name of the person or firm, to whom the license is to be issued and the place where such saloon or dram-shop is to be

kept, which application shall be signed by a majority of the property owners, according to frontage, on both sides of the street in the block in which such dram-shop is to be kept and shall also be signed by a majority of the bona fide householders and persons or firms living in, or doing business on each side of the street in the block upon which such dram-shop shall have its main entrance; *Provided*, however, that any person or firm who shall have made application as aforesaid, and received a license to keep a dram-shop shall not be required to present an application as above, in order to obtain a renewal of the license, to himself or firm unless at least one-quarter ($\frac{1}{4}$) of the property owners or bona fide householders, persons and firms doing business on both sides of the street in the block upon which the said dram-shop has its main entrance, shall file with the Village Comptroller at least Thirty (30) days prior to the time for the renewal of such license, a notice stating that the signers thereof object to the granting or renewing of the license to said person or firm."

The use of the language "shall file with the Village Comptroller at least thirty (30) days prior to the time for the renewal of such license, a notice stating that the signers thereof object to the granting or renewing of such license to said person or firm," I think plainly indicates that a written notice is contemplated under the ordinance. The word "signers" could not be used if a verbal protest were deemed sufficient.

Second. The language of the ordinance in question is plain, I think, that a period of at least thirty (30) days must intervene between the lodging of a protest with the license officer and the date at which the license period begins for each period a license has been applied for. A protest lodged with the license officer not thirty (30) days prior to such date of commencement of the license period would be, I think, insufficient to defeat the renewal of the license.

Third. This department has held and is now contending in the courts of this County, that a protest to be valid, must contain the signatures of (a) one quarter of the bona fide householders, persons and firms doing business on both sides of the street in the block upon which said dramshop has its

main entrance; or (b) one-quarter of the property owners upon both sides of the street in the block on which said dramshop has its main entrance.

In construing the language "upon both sides of the street in the block upon which said dramshop has its main entrance" this department has held that the consents shall be obtained upon both sides of the street between the nearest parallel cross streets upon which the main entrance is located, and does not contemplate the obtaining of signatures on both sides of the streets of the square itself in which the saloon is located and the opposite streets. Where a saloon has a main diagonal entrance upon two streets, this department has held that the protest must come from the property owners or bona fide householders, persons and firms doing business on both sides of such two streets upon which the diagonal entrance fronts. This latter point is now being litigated in a case in the Superior Court before his Honor, Judge Brentano.

Fourth. I am informed by the attorney for the applicant, that no written protest of any kind has been filed with the license officer thirty days prior to the commencement of the license period, and that any protest which may have been filed is merely a verbal one.

Under the circumstances thus stated, I am of the opinion that there is no legal protest against the renewal of this dramshop license, and that the same may be properly recommended by you to be issued.

Yours very respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Application of C. & N. W. Ry. Co. to Construct Additional Elevated Tracks.

September 15, 1905.

MR. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

We return herewith the letter of S. A. Lynde, General Attorney for the C. & N. W. Ry. Company, requesting that you issue a permit authorizing that company to construct some false work in Wilcox avenue and Rockwell street pending the delivery of iron girders for a permanent bridge to support an additional track over the subway at Wilcox avenue.

Reference is made in this letter to the track elevation ordinance of January 18, 1897, by which this company was required to elevate its tracks across these streets. There is no authority in this ordinance for the laying of an additional track across the street. This authority is claimed by the company under the ordinance of August 8, 1853, which authorizes the Chicago, St. Charles, Mississippi Air Line R. R. Company "to construct, maintain, use and operate in the west division of said city one or more railroad tracks south of Madison street or north of Lake street and also any other railroad track within said city west of the west line of sections twenty (20), seventeen (17) and eighteen (18), which said Company may procure by purchase or otherwise; and to lay down said track or tracks across any street within the boundaries above described."

It is a matter of common knowledge that the company now has more than one track across Wilcox avenue at this place.

We are of the opinion that the authority granted by the Ordinance of 1853 did not give the company a continuing power to construct tracks from time to time as it might see fit, but that the power granted was exhausted by the construction of the original tracks, and neither this company

nor its successor has the right to lay any additional tracks across this street at the present time.

We have had a similar question raised by the Chicago Terminal Transfer R. R. Company upon its application to lay additional tracks across 79th, 80th and 81st streets under an ordinance authorizing the laying of "one or more railroad tracks." In that case the Appellate Court of the First District held that "the City Council gave by its ordinance permission to make crossings on a given route 'with one or more railroad tracks.' When the company chose to make them with 'one' and not 'more,' that particular permission may reasonably be said to be exhausted."

The authorities cited by the Appellate Court sustain this doctrine, and confirm our opinion that under the circumstances recited, the power has been exhausted. We are therefore of the opinion that you have no right to grant the desired permit.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First. Asst. Corporation Counsel.

Franchise of Northwestern Gas Light & Coke Co.

Chicago, September 19, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

Your communication addressed to this department in which you ask whether the Northwestern Gas Light & Coke Co. at any time obtained a franchise to sell gas in Chicago, either directly to consumers or to a company in Chicago possessing a franchise, was referred to me with instructions to advise you fully concerning the same.

I find, by reference to the records of the Town of Cicero, that on June 2, 1892, an ordinance authorizing one N. A.

McClary, his associates, successors and assigns, to construct, operate and maintain gas works for the purpose of supplying gas in the Town of Cicero, for the term of thirty years, was passed by the Board of Trustees of that town, and the same was duly accepted by the grantee, who afterwards assigned his rights to the Cicero Gas Company. The requirements were fulfilled, and the ordinance was in force on April 4, 1899.

On the last mentioned date certain territory before that time belonging to the Town of Cicero was annexed to the City of Chicago. Said territory was bounded by a line drawn as follows: Beginning at the intersection of 12th street and 48th avenue, thence north to Madison street, thence west to 52d avenue, thence north to North avenue, thence west to Austin avenue, thence south to 12th street, thence east to the place of beginning. There has been no other annexation of territory by the City of Chicago since then.

The Town of Cicero, on January 24, 1901, amended the original ordinance, and extended the rights of the company to 45 years, but as this was done after the annexation of the above described territory, this amendment does not apply to the territory annexed to Chicago.

The Northwestern Gas Light & Coke Company was subsequently consolidated with the Cicero Gas Company. It, therefore, has the right to distribute gas in the above described territory within the City of Chicago.

I am, moreover, of the opinion that if this company desires to sell its gas to another company within the city, for distribution beyond the above territory, it would have the right to do so. The Gas Consolidation Act of 1897 gives it this right. It empowers all gas companies in the state to convey their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city. Hence, it would have the right to sell its gas, which is a part of its property, to another company doing business in Chicago.

The Consolidation Act also provides that "all companies authorized to distribute gas in any city, town or vil-

lage, shall have power to distribute the same in any territory annexed to such city, town or village.”

Under this clause the companies which were operating in Chicago prior to the annexation of the above described territory, have the right to operate in the annexed territory. But I do not believe this clause gives the Northwestern Company a right to distribute gas beyond this territory in other parts of the city. It cannot extend its pipes into other parts of the city beyond the territory described.

I arrive at this conclusion by applying the well known rule that a public grant must be construed strictly against the grantee, and cannot be extended by implication.

Mills v. St. Clair, 2 Gilm. 197.

Wiggins F. Co. v. City of E. St. L., 102 Ill. 560.

City of Chicago v. Mut. El. L. & P. Co., 55 Ill. App. 429.

The statute cannot, under this rule, be construed to mean that a company which obtained the right to operate only in annexed territory, has the right to operate in the territory within the original boundaries. The Supreme Court in upholding the constitutionality of the Consolidation Act (*People v. P. G. L. & C. Co.*, 205 Ill. 496) clearly intimates that such enlargement of the powers and privileges of the Northwestern Company is not permissible under the act. It says:

“While Section 9 makes the consolidated corporation subject to, and requires it to perform for each of the companies so entering into said agreement or agreements, the legal obligations resting upon each of them, respectively, under their respective charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct, it does not confer upon it any enlarged powers or privileges. Moreover, there is nothing whatever in the petition to show that the rights, privileges and franchises of any or either of the consolidated or merged companies are larger or in any way different from those of the respondent.”

In case the Northwestern Company was permitted to enter the territory of the City beyond that described above,

it would not only be an enlargement of its powers and privileges beyond the powers authorized in the act, but it would give to this company greater powers and privileges than the consolidated company now operating in the City has, since the latter must maintain certain plants for the manufacture of gas within the City, while the Northwestern Company would be under no obligation to do so.

You next inquire whether the Department of Public Works has the right and power to undertake an investigation to determine the truth of the report that said Northwestern Gas Light & Coke Co. is selling gas within the limits of the City.

I assume that, owing to the fact that this company has certain rights as defined above, you will now desire to know whether your department has the right to undertake an investigation to determine whether the Northwestern Gas Light & Coke Company is distributing gas beyond the territory described above.

This, in my opinion, depends on the nature of the investigation. There is no authority vested in that department either by statute or by ordinance which gives it the right to subpoena witnesses or compel the attendance of any one for the purposes of examination. Neither has the department the right to make any extraordinary expenditures for that purpose and thus consume the funds appropriated for the needs of the department in making such investigation, unless ordered by the Council. On the other hand, it is clearly within your power under Sections 1841 and 1842 of the Municipal Code to gather such information as may be within reach through the ordinary channels of information and through the investigations of employes of the department as to the improper use of the streets and alleys of the City for such a purpose. Such an investigation is within the implied powers of the Commissioner of Public Works.

Under the above sections he is invested with power "to regulate and control the manner of using the streets * * * for the laying down of gas, water or steam pipes * * * and to determine the location thereof." If the Commissioner has

reasonable grounds for believing that an improper use of the streets has been made, that pipes have been laid and connections made for which no applications were filed in due form, or that such applications did not show the location of same, or that the work has been done in any other manner than as required by the permit, or that any fraud, artifice or deceit was used in obtaining the consent for doing such work or in the doing thereof, then it is the duty of the Commissioner, under the large discretionary powers vested in him, to make such investigation through the means at his command, as will enable him to ascertain the truth or falsity of his information.

Under Section 1521 of the Code the Mayor may require the Commissioner to make a report as to such matters, and *e converso* it must be presumed that if the matter comes to the attention of the Commissioner before it is brought to the Mayor that in such case the Commissioner may prepare a report for the Mayor and present same to him without being first required to do so. If it is necessary or desirable to have the assistance of other departments in making such investigation, the Mayor has the power to direct such assistance. The Commissioner has a large discretion in the subject.

In the hope that my answers to your questions cover fully the points about which you inquire, I remain,

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Palmer House Columns Encroaching on the Streets.

September 22, 1905.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

Replying to your letter of the 18th inst., with attached survey showing that the ornamental columns of the Palmer House are erected on public highway space, in which you ask whether the City may compel payment for such space, I beg to advise you that the Illinois decisions hold that a permanent encroachment upon a public street for a private use, to the exclusion of the public, is a nuisance and that an ordinance designed to grant such a privilege is invalid. Notwithstanding the improvements in question may be extensive and permanent, the City cannot be estopped from requiring their removal.

Answering your question as to whether you can compel payment for the use of the space so occupied, I am of the opinion that since the City has no power to grant such a use, it cannot maintain an action to compel payment therefor. Power to compel the removal of these columns is no doubt sufficient for your purpose. (*People v. Harris*, 203 Ill. 282.)

Yours truly,
MICHAEL J. SULLIVAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Mail Chutes; Power of City to Remove Obstructions Placed on Streets by U. S. Governments.

September 23, 1905.

HON. JAS. HAMILTON LEWIS, Corporation Counsel.

Dear Sir:

In pursuance of your instructions, I have made an investigation with a view to determining the City's rights concerning the obstructions in the shape of large mail boxes placed on the Dearborn street side of the Federal building, by the Post Office authorities. I am of the opinion that the City has a right to compel the removal of these boxes.

The law relating to the rights of a municipality in streets as against abutting property owners is well defined. Aside from a reversionary interest which accrues only upon the happening of a remote contingency, the abutting property owner has parted with his title to the portion of his land which was dedicated to public purposes. This is binding on his grantees as well.

The only question, therefore, is, whether the Federal Government, when it acquires the land of such an abutting property owner, stands in any different position than any other grantee.

The case of *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, seems to be the leading case on the question of Federal jurisdiction over lands acquired by the United States within the limits of a state for the erection of public buildings.

The court in that case distinguished between land acquired by the general government for the special purposes named in Article 1, Section 8, of the United States Constitution *without* the consent of the State and lands purchased *with* the consent of the State. It holds that:

"Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes

of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.”

The court in that case also holds that a state may, for such purposes, cede to the United States exclusive jurisdiction over a tract of land within its limits acquired in a manner not provided for in the Constitution of the United States, and may prescribe conditions to the cession, if they are not inconsistent with the effective use of the property for the purposes intended.

This case has been followed in *C. R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542, in *Benson v. U. S.*, 146 U. S. 330, and in *Palmer v. Barrett*, 162 U. S. 399.

It will thus be seen that the United States can control such lands in one of three ways, viz.: First, by purchasing, with the consent of the State, in which event its jurisdiction is exclusive; second, by acquiring otherwise than by purchase, with the consent of the State, in which case its jurisdiction is limited by the Act of Legislature consenting thereto; third, by acquiring either by purchase or otherwise, without the consent of the State, in which event it has only the rights of an ordinary proprietor.

The United States acquired title to the land in question by condemnation. The legislature, by act approved December 14, 1871, and afterwards amended by act approved March 7, 1872, granted to the United States power to purchase and condemn land for the purposes of the government, also giving it exclusive legislation and concurrent jurisdiction, together with the State of Illinois, over such land and the structures thereon. It also provided that the street and alley running transversely through the present block should be vacated, and that the title to the land so vacated should be in the United States.

Hence the United States acquired title to this block otherwise than by purchase, but with the consent of the legislature. Its jurisdiction is therefore not exclusive, but limited to what the legislature expressly conceded. By the act of the legislature it acquired the right of exclusive legislation

and concurrent jurisdiction over the block and over the vacated street and alley, but not over the sidewalk surrounding the block.

I went into these matters because I believed they might be useful to you in determining the future attitude of the City. In the course of my investigations, however, I discovered a fact which simplifies the situation. I found that the City acquired title to the western part of Dearborn street by condemnation, for the purpose of widening the street. It, therefore, owns the property on which the mail boxes are located in fee simple. Its jurisdiction is complete, since the United States has not even a remote reversionary interest in the property.

As to the question of whether or not these mail boxes are nuisances, the law is clear. It is not within the power of the municipality arbitrarily to declare that a nuisance which is not such in fact.

Dillon on Mun. Corp., Sec. 374.

Vill. of Des Plaines v. Poyer, 123 Ill. 348.

Yates v. Milwaukee, 10 Wall. 497.

I am unable to find a single decision wherein an ordinance pronouncing sidewalk obstructions nuisances was not upheld.

In the well known case of *Knox v. City of N. Y.*, 55 Barb. 404, the court held that a bridge over the street which was intended as an aid to travel was a nuisance as an obstruction to the free use of the sidewalk. Among other cases of a like character which support this view, are:

Hibbard v. City of Chicago, 173 Ill. 961.

Dreher v. Yates, 43 N. J. L. 473.

Fox v. City of Winona, 23 Minn. 10.

City of Col. v. Jaques, 30 Ga. 506.

City of Wilkesbarre v. Burgunder, 7 Kulp. 36 (Pa. 1893).

Ex parte Taylor, 87 Cal. 91.

Bonnett v. San Francisco, 65 Cal. 230.

Marini v. Graham, 67 Cal. 130.

Memphis v. Lenore, 6 Coldw. 415.

White v. Kent, 11 Ohio St. 550.

Clark v. Fry, 8 Ohio St. 358.

An exhaustive brief on municipal power over nuisances affecting highways may be found in the note under *Hagers-town v. Witmer*, 39 L. R. A. 649.

“In doubtful cases, when a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power to declare and define what shall be nuisances, their action, under such circumstances, would be conclusive of the question.”

North Chicago City Ry. Co. v. Lake View, 105 Ill. 207.

Harmon v. City of Chicago, 110 Ill. 400.

Laugel v. City of Bushnell, 197 Ill. 20.

Since the mail boxes are no more than chutes, and as their removal would be no serious hindrance to the handling of the mails, action on the part of the City authorities could not be construed as an interference with the United States mails, especially if such action is taken before the Post Office occupies these quarters.

Respectfully submitted,

LEON HORNSTEIN,

Assistant Corporation Counsel.

C. H.

**Special Park Commission—Special Assessments for
Playgrounds, and Improvements of Like
Character Cannot be Levied.**

September 26, 1905.

MR. A. W. O'NEILL, Secretary Special Park Commission.

Dear Sir:

I hereby acknowledge receipt of your favor of the 7th inst., addressed to the Corporation Counsel, Honorable James Hamilton Lewis, requesting an opinion on the two following questions, which I shall answer in the order stated by you:

“Has the City, through its Board of Local Improvements, the legal power and right to levy a special assessment on property within the benefited localities, to be collected on the instalment plan, for the purpose of raising funds with which to purchase land to be used for playgrounds and athletic fields, the same as other local public improvements are provided for?

“Also, if your opinion is adverse to the proposition, has the City, under its charter powers, the right to proceed under such remedial legislation as would be necessary, and what form should such enabling legislation take?”

In answer to your first inquiry I am of the opinion that special assessments cannot be resorted to for the purposes stated, because I do not think it constitutes a local improvement within the meaning of the law. The only basis upon which either a special assessment or special tax can be sustained, is, that by the proposed improvement the property subjected to the assessment or special tax would be enhanced in value to the extent of the burden of the assessment. (149 Ill. 310.) The distinction between a local improvement which may be paid for by special assessment on the adjacent property and a public improvement which should be paid for by the public at large, is, that in the former case the adjacent property receives a special benefit by reason of the improvement, while in the latter case the benefits that may result

from such improvement are equally diffused throughout the municipality.

In answer to your second inquiry I am of the opinion that the City of Chicago possesses full powers under its charter to construct local improvements for all proper purposes by special assessment and that an enabling statute authorizing the levy of a special assessment for the purposes stated in your first inquiry would be inconsistent with the theory of special assessments and would be unconstitutional.

Very truly yours,

ROBERT REDFIELD,

Attorney, Board of Local Improvements.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Storing of Ammunition or Explosives.

September 26, 1905.

MR. JOHN CAMPION, Fire Marshal.

Dear Sir:

We return herewith the application of Sears, Roebuck & Company for a license to carry ammunition in their main building or warehouse, according to the requirements of the trade at the season of the year, together with the report thereon made by John C. McDonnell, Inspector. You ask whether or not you can compel the applicant to store the ammunition specified in any one building on a certain floor, or whether the applicant can store it in different buildings on various floors subject to your approval.

It would seem from Section 957 of the Code, that the applicant must state the location at which it is intended to keep the explosives or cartridges. We are of the opinion that under this section you are entitled to a statement so specific that it will enable you to find the particular part of the premises in which the ammunition is to be kept.

We are further of the opinion that it is not within your power to compel the applicant to keep all his ammunition in one building, but it is within your power to compel him to state the location of the buildings and the portion of the buildings in which he will store the ammunition.

By Section 961, it is provided that all ammunition and explosives shall "be kept stored in such a manner as shall be approved by the Fire Marshal and in a situation remote from any other inflammable matter." This certainly gives you control of the matter and enables you to specify the place in the premises in which ammunition is to be kept so long as your requirements are reasonable.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Liability of the City for Juror's Fees.

September 27, 1905

L. E. GOSSELIN, Esq., Auditor & Deputy Comptroller.

Dear Sir:

I have your favor of September 19, 1905, in which you request an opinion "as to whether or not the City is liable for juror's fees incurred in trials before Justices of the Peace for violation of City ordinances?"

In replying thereto I desire to state that it depends upon the nature of the suit. If the suit is one for a penalty for the violation of a City ordinance, and the defendant refuses to sign a jury waiver, a jury must be secured to try said case or the defendant cannot be imprisoned for failure to pay any fine which might be imposed in said trial (see Par. 175, Chap. 19 S. & C. Ann. Statutes), and in such cases the City would be liable for juror's fees.

In the event of an ordinary civil suit in assumpsit for violation of City ordinances where the defendant is not liable to imprisonment for failure to pay the judgment rendered against him, the defendant would be required to advance fees for a jury if he desired a trial by jury, the same as if any one other than the City were party plaintiff.

The above opinion applies to all Justices of the Peace, whether Police Magistrates or Justices to whom changes of venue may have been taken by the defendant.

Yours very truly,

FRANK L. CHILDS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

**Expiration of Ordinances Permitting Chicago Union
Traction Co. and Chicago City Railway Co.
to Lay Tracks.**

September 27, 1905.

JOSEPH M. PATTERSON, ESQ., Commissioner of Public Works.

Dear Sir:

I have your letter of the 15th inst., transmitting a communication from the Secretary to the Mayor, which latter letter transmitted to you the application of J. M. Roach, General Manager for the Receivers of the Chicago Union Traction Company, for a permit to construct a double track approximately 150 feet in length connecting the tracks of the Chicago Union Traction Company and the Chicago City Railway Company in Halsted street at O'Neil street, and equip the same with over-head trolley connecting the respective over-head trolleys of said lines of railway, and also to replace the present double curve in the lines of railway controlled by said Receivers on Halsted and O'Neil streets with new double curve fitted for the use of electric cars.

Attached to said application is a sketch showing the proposed track and the renewal of curves.

The first paragraph of said application, which bears date of September 13, 1905, is as follows:

“At the special instance and request of the authorities of the City of Chicago, and to meet the public demands for a through route over Halsted street from Root street to Milwaukee avenue upon the lines of street railways in said Halsted street controlled by the receivers of the Chicago Union Traction Company and the Chicago City Railway Company, the receivers of the Chicago Union Traction Company under direction of the United States Circuit Court for this district, have consented to allow the Chicago City Railway Company to run certain of its cars over the lines of railway controlled by such receivers on Halsted street between O’Neill street and Milwaukee avenue by over-head electric trolley.”

The Chicago Union Traction Company operates in Halsted street between Harrison street and O’Neil street by virtue of an ordinance passed September 25, 1876, to the Chicago West Division Railway Company, granting the privilege for 20 years, and thereafter until the City purchased under authority of the City Council. This ordinance was extended July 20, 1883, for a period of 20 years and expired July 30, 1903. (Special Ordinances, page 1337.)

The Chicago City Railway Company operates in Halsted street, from 39th street to and across the south branch of the Chicago River to the connection with the tracks of the Chicago West Division Railway Company at O’Neill street by virtue of an ordinance passed July 9, 1877, granting the privilege for a period of 20 years and until the City Council authorizes some other corporation to purchase. This privilege was extended July 30, 1883, for a period of 20 years and expired July 30, 1903. (See page 1082, Special Ordinances.)

The Chicago Union Traction Company operates in O’Neil street, from Halsted street to its car-house on O’Neil street, by virtue of an ordinance passed November 27, 1876, to the Chicago West Division Railway Company granting

the privilege for a duration of 20 years, and thereafter if the company elects until the City purchases under a Council order. This privilege was extended July 30, 1883, for a period of 20 years and expired July 30, 1903. (See page 1340, Special Ordinances.)

The privileges granted by said ordinances were held by Judge Grosseup, in the litigation with the receivers of the Chicago Union Traction Company, not to have been extended by the Act of 1865, commonly known as the "Ninety-nine Year Act", and therefore each of said ordinances has by its terms expired, subject however to any rights that the companies may have by virtue of the City purchase clauses therein contained.

The ordinance of November 27, 1876, granting authority to the Chicago West Division Railway Company to construct and operate in O'Neil street from Halsted street to its car-house on O'Neil street, authorized the company,

" * * * to lay down, operate and maintain a double or single track railway with all necessary and convenient turn-outs, side-tracks, turn-tables and switches on O'Neil street, to enable said company to connect its tracks on South Halsted street with its car-house on O'Neil street" (see page 1340, Special Ordinances).

Owing to the fact that the City has taken the position that said ordinances have terminated, it is necessary for the City Council to authorize the construction of said track, approximately 150 feet in length, connecting the lines of railway of the Chicago City Railway Company and the Chicago Union Traction Company in Halsted street at O'Neil street, and to equip the same with over-head trolley connecting with the respective over-head trolleys of said lines of railway, and also to replace the present curves in the line of railway controlled by the Receivers of the Chicago Union Traction Company on O'Neil and Halsted streets with new curves.

I enclose herewith a resolution and Council order on the subject-matter.

I return herewith the letter of the Secretary to the Mayor to you of the 14th inst.; the application of the company of the 14th inst., and the sketch attached thereto.

Very truly yours,

EDGAR B. TOLMAN,

Special Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Divisibility of Fee for Rendering License.

September 28, 1905.

HON. JOHN E. TRAEGER, City Collector.

Dear Sir:

I have your communication of the 27th inst. requesting the opinion of this department as to, first, are licenses for rendering establishments divisible to the extent that a renderer, starting in business after the beginning of the license year, may pay his license from the month in which he starts in business, and, second, can the City collect the full amount of the license fee for the license year from a renderer who is about to retire and close up his plant, or should the amount collected be only a *pro rata* amount up to the time of his going out of business.

1. The rendering ordinance provides for the payment of an annual license fee for the privilege of engaging in the rendering business, and such payment of such fee is a condition precedent to the right to enter any business. Such fee is not made divisible by the ordinance, and I am of the opinion that a person starting in business after the commencement of the license year must pay the entire license fee, even though only a portion of the license year remains during which such business may be conducted.

2. This department has hitherto held that where a person voluntarily retires from business after having paid the

fee for the entire license period he is not entitled to rebate, and by parity reasoning the City is entitled to the entire license fee for the whole license year whether the licensee exercises the privileges conferred by the license during the entire year or not.

The fact that the licensee goes out of business during the year does not affect his liability to pay the entire license fee for the entire year to the City.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Exemption from Taxation of Property Leased by City.

September 28, 1905.

HON. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

I have your communication of the 27th inst. requesting the opinion of this department as to whether the land leased by the City of Chicago, at No. 2 Washington street, upon which it has erected a fire engine house, should under the provisions of the statute be exempt from general taxation. Your communication suggests that this property would come under the provision of the statute exempting from taxation "all public buildings belonging to any county, township, city or incorporated town, with the ground on which such buildings are erected, not exceeding in any case 10 acres."

While this provision of the statute (Clause 6, Section 2, Chapter 120, Revised Statutes of Ill.) might be applicable to the case presented, I think the exemption would be more properly classified under Cause 8 of the same section, which provides that there shall be exempt from taxation "all fire

engines and other implements used for the extinguishment of fires, with the building used exclusively for the safe keeping thereof, and the lot of reasonable size on which the building is located when belonging to any city, village or town."

The question might arise, it is true, that the lot in this instance, being a leasehold estate, does not "belong" to the City. I think, however, the intention of the Legislature was to exempt from taxation all fire engine houses and the real estate used for their erection so long as said real estate was devoted exclusively to this purpose. In any event, however, I am of the opinion that the land in question is exempt from taxation whether under the Clause 6 quoted by you, or under Clause 8, and for the purpose of replying to your inquiry, it is immaterial under which clause the exemption arises, provided the property is exempted from general taxation.

Respectfully yours,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Application of Ogden Street Railway Co. to Lay Additional Track.

October 2, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

I have the communication to the former Commissioner of Public Works from the General Manager of the Ogden Street Railway Company, making application for a permit to lay an additional track in South Fortieth avenue, from the north line of West Madison street to the center line of West Taylor street, and to move the present single track in said South Fortieth avenue between said points.

In the first place the communication above referred to mentions an ordinance of June 16, 1904. There was no Council meeting upon such a date and consequently no ordinance passed. The ordinance referred to is an ordinance of June 6, 1904, Current Council Proceedings, page 448, *et seq.* wherein authority is given authorizing the Ogden Street Railway Company, its successors and assigns

“to lay down an additional track in South 40th avenue, from the north line of West Madison street to the center line of West Taylor street, and parallel to the single track now in said South 40th avenue between said points, and to move the present single track in said South 40th avenue between said points so that the said tracks shall occupy the center 16 feet of said South 40th avenue between the points aforesaid” (see p. 448 *et seq.* current council proceedings).

This entire question, the points involved therein and the matters pertaining thereto are covered in a communication to the Commissioner of Public Works of March 16, 1905, wherein First Assistant Corporation Counsel, Wm. H. Sexton, decided that there was no legal objection to the issuance of this permit, provided the following insertion was made in the permit:

“This permit is issued under authority of the ordinance of June 6, 1904, printed at pages 448, *et seq.* of the council proceedings of 1904-5, and it is hereby stipulated that, if at any time in the future the City of Chicago shall take proceedings to acquire the ownership of any of the lines mentioned in the ordinance of February 18, 1895, granting to the Ogden Street Railway Company the right and privilege to lay down, construct, maintain and operate for the period of 20 years from the date of the passage thereof, a single or double track street railroad on certain streets therein named, including South 40th avenue, otherwise known as Crawford avenue, from the north line of West Madison street to the center line of 31st street, or if the City may elect to cause the value of said lines, or any part thereof, to be ascertained by appraisement, condemnation or otherwise, said valuation shall be made as though this grant had never been made, and as though the lines in said ordinance of February 18, 1895, were then, as now, op-

erated in connection with a single track railway on said South 40th avenue between West Taylor and West Madison streets; and the tracks herein authorized to be laid, if so taken or appraised shall be appraised in like manner and under like conditions and restrictions, so that nothing resulting from the permission and authority granted by said ordinance of June 6, 1904, shall ever operate to appreciate the value of the street railway rights in said street as now existing."

The matter having been so fully covered I can add nothing in addition thereto, but should you be unable to find this opinion among the files in your office, I shall be happy to transmit you a copy thereof.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Construction of City Coal Contracts.

October 3, 1905.

JOSEPH M. PATTERSON, ESQ., Commissioner of Public Works.

Dear Sir:

Your letter, with reference to the failure of certain coal companies to live up to the chemical analysis which they submitted in the bids on which their contracts were based, was referred to me for reply. I have obtained a printed copy of the specifications, and also a blank printed form of the contract used. I have not, however, seen the bids or contracts upon which default is claimed, and can therefore advise you only in a general way concerning your rights in the premises. In any event, before any action is taken, I should want to examine the bids and contracts.

I find that in the printed specifications, while the bidder is required to give the name of the coal, the name and location of mine and the chemical analysis, there is nothing

in the specifications which would make it necessary for him to live up to these specifications. It may be that the bids are so worded that he would be required to live up to same, but the specifications do not require it. The only thing required by the specifications, so far as the quality of coal is concerned, is that a certain evaporative efficiency must be guaranteed. The specifications require that the bidder must specify the number of pounds of water that each pound of coal will develop, and provides for one test to be made each month after notice to the contractor.

If such test has been made from month to month and the conditions named in the specifications followed out; that is to say, if the coal was weighed on the scales of the pumping stations, and the water was measured in tanks, and a test made of eight hours' duration after notice as prescribed by the specifications, then in case the coal failed to develop the efficiency guaranteed, a *pro rata* reduction could be made by you of all coal delivered since the next preceding test.

It is also within your power to cancel or suspend the contract, to buy coal in the open market and deduct the additional expense, if any, from the amount due the contractor and if such amount does not cover such additional expense, then to recover in an action at law against the contractor.

All these things are distinctly specified in the contract and the covenants and agreements in the same will hold good in all cases where there is just cause for taking such action; that is to say, the Commissioner practically controls the situation. He cannot act arbitrarily or from caprice, but if he is satisfied that the guaranteed efficiency is not lived up to he can do all that I have stated.

As stated above, whether he can do the same in case the chemical analysis ONLY varies, depends altogether on the bid and contracts, which I have not seen.

Yours very truly,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

WM. H. SEXTON,

First Asst. Corporation Counsel.

Expiration of Time to Lay Tracks Granted by Ordinance.

October 4, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

We have the application of the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Company, for a permit to lay a side track upon its right of way between Bishop street and Ashland avenue, crossing Justin street and Laffin street and some alleys between 58th street and 59th street, together with the blue print accompanying the same.

This application was submitted by you some time ago, and on September 21st we returned it stating that we were of the opinion that the Company was not entitled to this permit.

Our opinion is based upon the fact that the ordinance of the Town of Lake, passed October 22, 1883, gave permission to lay "one or more railroad tracks" at this place, and that this is merely authority to lay such tracks as the Company may then, or within a reasonable time thereafter, think proper and necessary. We were and still are of the opinion that the ordinance does not authorize the laying of an additional track 20 years later. In our opinion, the power granted by the ordinance has been exhausted. Moreover, this particular ordinance was repealed by another ordinance passed by the Town of Lake March 25, 1885. While the repealing ordinance had no effect upon any track the Company may have laid prior to its passage, it certainly had some effect upon the Company's claim of right to lay additional track 20 years thereafter, and, in our judgment, destroyed that supposed right.

In his letter of September 26th, Mr. Frank J. Loesch, Counsel for the Pennsylvania line, says: "I feel confident the Corporation Counsel is laboring under a mistake of fact. At the time the road was laid out, and many years

afterwards, the right of way ran mostly through unsubdivided lands, in fact some of the principal streets and some entire subdivisions have only been laid out across the right of way within the last two or three years, and I am sure that makes a very decided difference in the legal position." It was upon this belief that you made a re-reference of the application.

Upon examining the records in the Map Department, we find that the land affected by this application was subdivided and a plat thereof placed on record October 9, 1868, and this plat shows that Justin street and Laffin street, and the alleys affected, extend across the railroad right of way. In our opinion, this is sufficient evidence that the streets were in existence before the Company acquired any right of way, and, consequently, the Company's rights are subordinate to those of the City and it has no right to lay the additional track across any street or alley without the consent of the City.

We return herewith the original application for permit, with blue print accompanying it, and the letter of Mr. Loesch above referred to.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Right of Pennsylvania Lines Temporarily to Open Wall During Track Elevation.

October 5, 1905.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

Your communication to this department with reference to openings in wall south of the Pennsylvania Company's

tracks, between Taylor street and Ashland avenue, was referred to me for an opinion. I note what you say in your letter concerning the claim of certain property owners that their agreement with the railway company did not permit the latter to make any openings.

I made some inquiries concerning this alleged agreement. I found some parties who claimed to know that there was such an agreement in existence but, on the other hand, the attorney of the railroad company declares that the only provision for such a wall was in the ordinance granting right of way to the Columbus, Chicago & Indiana Central Railway Company, passed April 1, 1872, in which a wall is provided for and required to be kept in good repair by the railroad company during its occupancy of Depot Place, which appears to be one of the names by which said street (also called Arbor Place) was known.

Such a contract as you speak of, and of which others claim to have knowledge, if executed at all, was executed before the great Chicago fire; consequently, I would be unable to find any record of same in the Recorder's office, and in the face of the positive denial of the attorney for the railroad company of the existence of such a contract, I do not see how I could make any further inquiry concerning it which would be of any benefit under the circumstances.

I am, moreover, of the opinion that whether there is such a contract in existence or not, it has no bearing on the question at issue, viz: the right of the railroad company to make openings in said wall during the elevation of the tracks. The ordinance giving the said company the right to elevate its tracks gives it, also, such rights as will permit it to cut through this wall temporarily.

I am informed that the holes in said wall are only intended to be used while the work of elevating said tracks is going on, and that the purpose is to enable teams to reach certain switch and side tracks which have been temporarily established for the accommodation of traffic. The railroad will be compelled, after the elevation of the tracks is completed, to maintain said wall in good condition. All the

work pertaining to the elevation of the tracks is under the supervision and control of the Commissioner of Public Works, and he has a right to approve or disapprove of any temporary structure or opening or any operation of any character (see Ordinance, February 11, 1901). It is therefore only a question of whether the operations are being carried on to the satisfaction of the Commissioner of Public Works.

The property owners have their remedy in case their rights are interfered with. From your communication and the attached letter of Mr. Frank J. Loesch, I am unable to see how the rights of any property owner have been encroached upon.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

**In Re Injunctional Order in "City of Traverse" Case—
Contempt is Committed When the Spirit of an
Injunction Is Violated.**

October 6, 1905.

HONORABLE EDWARD F. DUNNE, Mayor.

Dear Sir:

In response to your verbal request as to the liability of General Superintendent and Assistant General Superintendent of Police to a contempt charge for the violation of a restraining order issued by Judge Bethea of the United States Circuit Court in the case of the *American Wireless Telegraph Company v. The City of Chicago and others*, I beg to say that the order in question, so far as is material to a consideration of the case, is as follows:

The court finds that the complainant is entitled to the relief prayed in said bill, and that a restraining order issue, restraining the defendants and each of them, their agents, employes, servants and assistants (except the City of Chicago) from in any way interfering with the instruments set forth in said bill of complaint, or with any other instruments or property of complainant used by complainant in its said business of telegraphing (wireless or other), or in any way interfering with the business of said complainant as a Telegraph Company in sending telegrams (wireless or other) to the Steamer "City of Traverse" or any other steamer or vessel upon the waters of Lake Michigan in the States of Indiana or Michigan until the further order of this court.

(Signed) Bethea.

The facts in the case are: First: That the Police Department has established a certain instrument or instruments for the transmission of wireless telegraphic messages and information within the confines of the State of Indiana. Second, that the object and purpose of the erection and operation of the instruments in question was to delay, interfere with, and to a greater or less extent, render impossible the transmission of certain other wireless messages being sent, or which might be sent, from the office of the complainant company to the ship "City of Traverse" while on the waters of Lake Michigan within the confines of the States of Indiana or Michigan, or messages sent from the State of Indiana by means of the company's instruments located there to the company's offices in the Railway Exchange Building.

In my opinion there can be no doubt that the action of the police officials, dictated though it be by whatever motive of public morals, is viewed in the most lenient manner, it is a constructive violation of the letter and spirit of the injunctional order referred to. There is no pretense made by the Police Department that they are using the instrument above referred to for any other purpose, or in any other wise than to interrupt, break up and interfere with the communication between the instruments of the company situated upon the shore and the receiving instrument

upon the "City of Traverse". I consider this conduct, arising though it may from the most praiseworthy motives, at least, a subterfuge amounting to a substantial violation of the injunction, and in my opinion, under the authorities, if persisted in, would be a punishable violation of the court's order.

Spelling on Injunctions, Sec. 1110.

Loven v. The People, 158 Ill. 159.

Negennis v. Parkhurst, 3 H. W. Green (New Jersey Equity) 433.

Perry v. Kinnear, 42 Ill. 160.

The Court has often held that the language of an injunction would be interpreted as is natural and obvious, meaning, as I think, that adopting such interpretation, a violation is shown in the present case. The court also held that, although the command of an injunction must be implicitly obeyed, it is the spirit and not the letter of the command to which obedience is required.

From the facts above stated, it cannot be but obvious that the spirit of the injunctive order herein is to protect the business of the complainant in transmitting wireless messages from its shore stations to the "City of Traverse" while that boat is beyond the confines of the State of Illinois, and it is equally plain that the acts of the Department of Police constitutes a serious interference, interruption and menace to such business of transmission.

I am, therefore, of the opinion that the acts of the Police Department heretofore referred to, should be abstained from during the existence of the injunctive order above quoted.

Respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Civil Service Employees Employed Temporarily Entitled to Credit Marks for Service.

October 6, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

In a communication dated the 27th ult., addressed to this department, you inquire whether, within the limits of the Civil Service Law, credit marks can be given to the men who volunteered their services during the recent strike as special policemen.

I am informed that your question is intended to apply to those volunteers for special service who, prior to becoming special policemen, had taken examinations and were on the eligible list for appointment to the police force.

Section 4 of the Civil Service Act which, with other sections of the Act, deals with the powers of the Civil Service Commissioners, is as follows:

“Said Commission shall make rules to carry out the purposes of this Act and for examinations, *appointments* and removals, in accordance with its provisions, and the Commission may from time to time make changes in the original rules.”

Section 10 of the same Act provides that, when the head of the Department has notified the Commission of a vacancy, “said Commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs.”

The Civil Service Act, like any other statute is to be construed with reference to the object sought to be accomplished by the enactment. Our Supreme Court has repeatedly said that the object of the adoption of the Civil Service Act was to secure the appointment to municipal offices and position of those who demonstrated merit and fitness for the positions.

I understand that during the recent strike a general call was issued to all those whose names were then upon the eligible list for appointment to the police force, so that every eligible had the opportunity, if he saw fit, to show his ability as a police officer.

It seems to me that the Civil Service Commission, under Section 4 of the Civil Service Act, have the right to pass a general rule providing that, in selecting names from the eligible list for appointments to the police force, those who creditably served the City during the recent strike or, for that matter, during the time any of them were temporary or 60-days employes, shall be given credit marks of a certain per cent for this experience. It may be objected by eligibles who have not seen service since the taking of the examinations that, inasmuch as there was no rule in force allowing such credits at the time of the examinations, their rank or place upon the eligible list cannot be affected by subsequent occurrences; in other words, that they have certain vested rights obtained by the taking of these examinations.

The answer to such objection, if it be made, is that the Act is to be construed with reference to the public good rather than with reference to the personal good of candidates for office. No officer has any property rights in his office, and I do not see how it can be said that any one eligible to appointment to the police force can have any vested right or property right in his rank or number upon the eligible list.

All that is necessary is that the rule shall be of universal application, affecting all eligibles alike. That this construction of the power given to the Civil Service Commission by Section 4 of the Act is in accordance with the spirit of the Act, is shown, it seems to me, by the provision of Section 10 that "said Commission may strike off names of candidates from the register after they have remained thereon more than two years."

The Act was not designed to safeguard the personal interest of candidates for appointment to office.

Reference has already been made to the provision of Section 10 of the Civil Service Act, requiring the Commission to certify for a vacancy to the appointing officer the name of the candidate who stands highest on the register or eligible list. Should it be claimed that this provision furnishes a legal or practical objection to the suggested rule of the Civil Service Commission, any objection could be obviated by passing a rule instead of the one suggested, requiring the Commission immediately to advance the rank or standing of those eligibles who are entitled to credits for strike service or other special service.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Nature of Moving Picture Entertainments and Applicability of the Fire Ordinances.

October 17, 1905.

HON. JOHN CAMPION, Fire Marshal.

Dear Sir:

Your letter of October 13th relating to application for license to conduct an entertainment at Waverly Hall, 450-456 West Madison street, was referred to me for an opinion. You state in your letter that the building for which application for a license was made has a seating capacity of 1,200 on the first floor, and about 500 in the gallery, and that the entertainment which it is proposed to give in the said building is a reproduction of a certain fight, and consists of moving pictures which are reflected on a canvas background.

I understand from the application that it is contemplated to secure a license for this hall for the remainder of the license year, and that the hall comes within the classification described as Class 4 in the building ordinances.

You first inquire whether the screen or canvas on which the picture are to be thrown is to be regarded as "stationary scenery" as referred to in Section 310 of the Code. I do not think this comes within the definition of "stationary scenery" which is referred to in that section. Scenery is defined by Webster's International Dictionary as "the paintings and hangings representing the scenes of a play; assemblages of scenes; representation of place of action or occurrence."

The entertainment is an entertainment of the Sixth Class as defined by the ordinance relating to amusements, which includes all exhibitions of moving pictures.

Your next question is whether such an entertainment is a vaudeville performance: I do not think it can be regarded as such. The section of the ordinance which divides the various amusements into classes puts into the first class all entertainments of a theatrical, dramatic or an operatic character, and thereby distinguishes these entertainments from the class of entertainment which it is proposed to give in this place.

The word "vaudeville" originally was applied to a theatrical piece and, although the word has a wider significance now, and includes a variety of performances which are given on the stage of a theatre it still comes strictly within the definition of a theatrical performance.

"Theatrical business" has been held to include not only the pure drama, but also minstrel performances, operas and other like entertainments.

Shelby Co. v. Emerson, 72 Tenn. 314.

Bell v. Mahn, 1 L. R. A. 364.

You next inquire whether the proprietors are required to maintain fire appliances as provided for in Section 310 of the Code; also, whether the Fire Marshal is required to detail a fireman as provided by Section 311. Inasmuch as this entertainment does not come within a theatrical or vaudeville performance, and there is nothing to indicate that the said hall will be used regularly for any such perform-

ances, these requirements of the ordinance need not be fulfilled.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
First Asst. Corporation Counsel.

Police Operators Not Entitled to Same Privileges as Patrolmen.

October 11, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

We return herewith the petition of George E. Sanford and other police operators, setting forth their claims to certain rights which they say have been denied to them.

The petition is based upon the petitioners' belief that as they have taken, or can take, an examination under Civil Service regulations, and do certain work in the Police Department, they are therefore entitled to all the privileges and rights held and enjoyed by the men who have taken and passed the examination for police patrolmen.

We are advised by the Civil Service Commission that there is a radical difference between the examination taken by police patrolmen and that taken by police operators, and that difference is so great that the passing of the examination for police operators is no evidence whatever that the applicant can pass the examination for police patrolmen. We are advised by the General Superintendent of Police that the oath of office taken by police patrolmen is entirely different from that taken by police operators.

We are of the opinion that persons who have taken the examination for police operators are not eligible to the promotional examinations that can be taken by police patrol-

men, and that persons who have not entered the Police Department by an examination for police patrolmen or who do not hold over by reason of membership in that department before the adoption of the Civil Service law, are not entitled to the rights and privileges claimed by these petitioners. We are advised by the Police Department and the Civil Service Commission that the duties of police operators are such that they can very easily be performed by persons who are physically incapacitated from performing the work of a police patrolman, yet these police operators pass a Civil Service examination. It is provided by the Civil Service regulations that all original appointments on the Police Force shall be classed as Second Class Patrolmen, and that every applicant therefor shall pass the prescribed physical examination. No such examination is required of those who perform the work of police operators.

Complaint is made by the petitioners that this rule is in conflict with Section 9 of the Civil Service law, which provides that—

“All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations.”

We believe that this contention is not tenable, for the work of a patrolman is so unlike that of a police operator, and telephone or telegraph operator or clerk that the performance of one position will not in any manner qualify one for the duties of any of the others.

Section 1731 of the Code establishes the Department of Police, and declares that it shall embrace—

“The general superintendent of police, an assistant general superintendent of police, a secretary of the department of police, a private secretary to said general superintendent, one inspector of police for each police division, one captain of police for each police district and such number of lieutenants, detectives, sergeants, patrol sergeants, desk sergeants, patrolmen and *other employes* as may be provided by ordinance.”

We are unable to see any conflict between this section of the ordinance and the Civil Service law.

We are of the opinion that while the police operators are members of the Police Department and the Police Force, they are not patrolmen and are not entitled to the promotion that patrolmen can earn or to any of the benefits or advantages accruing to him from their positions.

We return the petition herewith.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Application of North Shore Electric Railway Co. to Set Line of Poles in Norwood Park.

October 11, 1905.

MR. WILLIAM CARROLL, City Electrician.

Dear Sir:

The application of the North Shore Electric Company for permission to set a line of poles on the south side of alley north of East Circle avenue, Norwood Park, Illinois, together with the communications addressed to you, were referred to me with instructions to pass on the question of whether the franchise under which said Company is now operating is still in force.

I find that the North Shore Electric Company claims its rights under the ordinance granted to Butler Lowry, which was passed November 6, 1893, by the proper authorities of the Village of Norwood Park, and accepted by Lowry November 11, 1893 (see Special Ordinances, Vol. 2, page 87). By this ordinance, Lowry, his heirs or assigns were granted the "right and privilege of erecting poles, or standards and in connection therewith a line or lines of a single wire or wires, or other electrical conductors, connections and fixtures within the corporate limits of said Village of Norwood Park

for the purpose of conveying and conducting electricity for illuminating, heating and mechanical purposes.”

Section 7 of said ordinance is as follows:

“All rights and privileges hereby granted to said Butler Lowry, or his assigns, shall be forfeited unless a plant for supplying electric light and power aforesaid shall have been erected hereunder and be in operation within one (1) year after the passage of this ordinance.”

I am informed that neither Lowry nor his assigns erected any plant for generating electricity, but simply put up poles and wires, and now claim that they fulfilled their obligation under the theory that the erection of poles and wires was the erection of a “plant”.

I am of the opinion that there is no authority for such a definition of the word “plant”. The wording of the section quoted above in itself indicates that something besides wires and poles were to constitute the “plant”. It speaks of a “plant” for *supplying* electric light and power, and this cannot be construed to mean anything else than a plant which generates electricity. Section 6 of the ordinance confirms this interpretation of the word “plant”. It provides for a certain contingency, namely, the destruction of the “plant” by fire, in which case, 90 days are allowed for a reconstruction, during which time there would be no forfeiture in case of the failure to continue furnishing light.

The definitions of the word “plant”, as given in Webster, Worcester, and in Houston’s electrical dictionary also confirm this interpretation, and I find the following judicial authorities on the point, all of which indicate that an electric “plant” consists of dynamos, converters, switch boards, etc., together with the necessary wiring and connections:

Roebling v. Humboldt E. L. & P. Co., 112 Cal. 288.

Maxwell v. Wilmington Dental Mfg. Co., 77 Fed. 941.

Fisher Electric Co. v. Bath Iron Works, 116 Mich. 293.

I am further informed that this Company is now obtaining electricity from some other plant outside of the

district in which it claims the right to operate. This it has no right to do, and the Company which is furnishing such electricity is also exceeding its powers.

“Where a corporation has a franchise intended to be exercised for public good, the due performance of those functions being the consideration, any contract which disables the corporation from performing them, or to transfer its rights and powers to others, or to relieve the grantee of the burden which the franchise imposes, is a violation of the contract with the State, and void, as against public policy.”

C. G. L. Co. v. P. G. L. Co., 121 Ill. 540.

State v. H. & N. H. R. R. Co., 29 Conn. 538.

Thomas v. R. R. Co., 101 U. S. 83.

Balsley v. St. L. A. & T. H. R. R. Co., 119 Ill. 72.

Am. Un. Tel. Co. v. U. P. R. R. Co., 1 McCrary 188.

Peoria, etc., Co. v. Coul, 68 Ill. 489.

Clark v. O. & S. W. R. R. Co., 4 Neb. 458.

Bestor v. Wathem, 60 Ill. 138.

St. L. J. & C. R. R. Co. v. Mathers, 71 Ill. 592.

St. Jo. & D. C. R. R. Co. v. Ryan, 11 Kan. 602.

Linder v. Carpenter, 62 Ill. 309.

The foregoing authorities and many others which could be cited establish clearly the rule that no public service corporation has a right to make a contract by which some other company assumes the burdens which are imposed on it by franchise or ordinance as a consideration for the grant.

Norwood Park is now a part of Chicago, and the rights of the village now inhere in the City.

A similar question arose some time ago in this City when the Hyde Park Electric Light & Power Company undertook to transmit electricity into the territory of the Mutual Electric Light & Power Company. Both companies had territory within the City limits. In that case the Mutual Company sought an injunction to restrain the City from interfering with the transmission of power from the Hyde Park Company. The Appellate Court in that case strongly condemned a contract similar to that which the North Shore Electric Company apparently had with some other electric

light concern which furnishes it with electricity. The court said:

“The right to furnish and transmit electricity is the essence of the grant. That alone is the public and useful end to be subserved. The poles, conduits and strung wires, are mere means to attain the useful ends accomplished by transmitted electricity.

“The mere permission to string wires might or might not, according to circumstances, be within the control and permission of the executive officers of the village or city, but the right to transmit and supply light, heat and power, by the powerful agency of electricity, over the streets and public grounds of a village or city, rests peculiarly and exclusively in a proper legislative grant. And such grant, when given, will never be extended except by necessary implication from that which is expressed.

“Here is a corporation upon which has been bestowed, by ordinance, a grant to erect and operate a plant for the transmission of electric light, power and heat, through streets, etc., within the prescribed limits of the village conferring the grant.

“No grant to go beyond the limits was conferred, not even by permission of adjoining municipalities.

“Possessing this grant, and operating under it, the Hyde Park Company, by contract with another corporation possessing a like grant and privilege within another and different territory, connects its wires at the line where the territories of the two corporations meet, with the wires of the other corporations, and proceeds into territory within which it has no power to operate, with the same effect and for the same purposes that it operates within its own territory.

“In every essential the doing of that is the same as if it had strung its own wires within that foreign territory and had transmitted electricity over them for the lighting and heating of, and furnishing power for, that territory.

“Such is a most palpable evasion of the limitations of its grant, and is a flagrant excess of the due exercise of its powers.

“Public policy, as well as the contractual obligations between the company and the city, are most seriously violated by such methods. The limits of franchises granted by municipalities should not be extended by doubtful implication.

“If such conduct by the Hyde Park Company should be sustained and it be permitted to thus extend itself into the territory it has thus entered, it might go on by successive connections with the wires of other companies with whom it should contract, and extend itself all over the City of Chicago, or, for that matter, the whole State.

“The cunning of men to overreach their fellowmen, and the State itself, by contrivances which at first sight seem harmless, but are in reality fraught with dangerous tendencies, can best be checked by a strict, and, perhaps, severe upholding of the law.”

While a municipal corporation may waive strict performance of the conditions under which a privilege is granted, mere delay on its part in bringing proceedings looking to a forfeiture or revocation will not constitute a waiver.

McQuillin, on Municipal Ordinances, Section 592.

While, therefore, the Village of Norwood Park apparently acquiesced in this matter, none of the rights of the City have been waived, and the City can therefore, even now revoke the ordinance on account of the failure of Lowry and his assigns to fulfill a condition subsequent.

I am, therefore, of the opinion that no further permit for the erection of poles or for the stringing of wires should be given to this Company. The ordinance under which this Company is operating is by the express terms thereof rendered void, although it may be necessary in order to cut off all rights of the grantees, for the City to formally revoke same by ordinance or institute legal proceedings. Notice ought to be given to the Company that all their rights and privileges thereunder have been forfeited.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

**Application of Chicago Electric Traction Co. to Set
Tracks on Halsted Street Between 79th and
81st Streets.**

October 23, 1905.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

I have your communication of today, requesting the opinion of this department as to whether you can legally issue a permit to the Chicago Electric Traction Company to construct an additional single track for a distance of about 1012 feet on the east part of Halsted street, between 79th and 81st streets, with its necessary turnout, etc., as shown by attached sketch.

The rights of this Company in the street at the point in question are those originally granted to the Englewood & Chicago Electric Street Railway Company under an ordinance passed May 2, 1893 (Special Ordinances, Vol. 2, p. 1390), giving it right "to construct and operate a railway with one or more tracks, not exceeding two, to be operated by electricity, with such tracks for turnouts, turntables, sidetracks and switches as said Company may deem necessary, along and upon certain streets in the City."

By Section 3 of this ordinance they are limited in the construction of their first track to one year in certain cases and two years in others. This track has been built as also portions of the second track shown on the attached sketch by the green lines on the east side of Halsted street.

The rights as to this second track are that the said Railway Company, its successors or assigns, "shall have the right and privilege of laying and operating the second track with the necessary switches, sidetracks and turnouts authorized by this ordinance whenever it or they shall deem it expedient and the public travel requires it."

The rights under this ordinance expires May 2, 1913, and under a mandatory ordinance of May 25, 1896 (Special Ordi-

nances, Vol. 2, p. 1398), the route laid down in the original ordinance is changed so as to give the grantee the same rights "on Halsted street, from 79th street to Summit avenue."

If, in your opinion, public travel requires this additional track, I am of the opinion that under the ordinance above quoted the permit may be issued by you.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Vacation of Highway in a Plat in Hoff's Subdivision Without Consent of All Property Owners.

October 24, 1905.

JOSEPH M. PATTERSON, ESQ., Commissioner of Public Works.
Dear Sir:

Your letter of recent date to which were attached two communications of the Superintendent of Maps and two plats of certain subdivisions in the territory bounded by 47th street, Lake avenue, Madison avenue, 48th street and Kenwood avenue, was referred to me for an opinion.

It seems that on April 2, 1874, a new subdivision was carved out of a portion of the above territory by one W. B. Pierce. On the plat of Pierce's Subdivision, which was duly recorded, there is shown a small park, also a street leading to and surrounding same which appears on the plat as Park Place. Since that time there have been numerous sales of property in Pierce's Subdivision.

It now appears that the owners of the property fronting on the small park referred to have drawn a plat of their property, which they call C. W. Hoff's Subdivision of Lots 7, 8 and 9 in Block 1, etc. In this new subdivision they

have undertaken to reserve a strip three feet wide on the west side of the street designated as Park Place, assuming that they have the right as owners of the adjacent property to close up a small portion of the public highway which was dedicated by the filing of the plat of Pierce's Subdivision, and which was accepted and used by the City as a public highway from that time to this.

I am of the opinion that these property owners have no such right, and that the Superintendent of Maps should refuse to approve the new plat submitted to him. It is not within the power of abutting property owners to close, cut off or vacate any portion of a public highway after it has been dedicated and accepted.

The authority to vacate property dedicated to public uses, which is given by Sections 6, 7 and 8 of Chapter 109 of the Revised Statutes of Illinois, does not contemplate such vacation after acceptance by the City.

Town of Lake View v. LeBahn, 120 Ill. 93.

Even if the general rule as stated above is questioned, which I do not think it can be in this particular case, the proposed vacation of this strip would not be proper because lots in the Pierce Subdivision were sold in accordance with the plat recorded on April 2, 1874. This recording was before the repealing statute of 1874 went into effect and, consequently, the Law of 1847 controls the question.

Our Supreme Court in the case of *Saunders v. the City of Chicago*, 212 Ill. 206, held that the law of 1847 does not authorize the proprietor of a platted tract in which a lot or lots have been sold to vacate any portion of the plat without the owners of the lots joining in the writing, notwithstanding the proprietor owns all the lots in the portion sought to be vacated. The same construction was also adhered to in the case of *Village of Riverside v. McLain*, 210 Ill. 308. Consequently, even though there had been no acceptance by the City, it would not be possible to vacate this strip except with the consent of all the property owners in the entire Pierce Subdivision. As this has not been obtained it is the duty of

the Superintendent of Maps to refuse his approval of the plat submitted as stated above.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Duty of Railroad Companies to Attend to the Lighting of Grade Crossings and Street Crossings.

October 25, 1905.

WM. CARROLL, ESQ., City Electrician.

Dear Sir:

I have your favor of the 21st inst., requesting the opinion of this department, first as to whether Railroad Companies maintaining and operating railroad tracks in this City are under a legal obligation to light the grade crossings and the street crossings in the subways under elevated structures, and second upon what City official the duty devolves to see that such crossings are properly lighted.

Sections 1997 and 1998 of Article 5, Revised Code of Chicago of 1905 provides as follows:

“Every person or corporation owning or operating any steam, elevated or street railway, whose track or tracks cross or intersect at, above or below grade any of the streets within the City, shall and they are hereby required to provide at their own expense proper and sufficient lights and care for the same at all such crossings or intersections. Such lights shall be of such kind as may be approved by the Commissioner of Public Works.

Any such persons or corporation failing to comply with the provisions of the last preceding section shall be fined not less than \$10 nor more than \$100 for each offense, and each day during which any crossing or intersection situated as aforesaid shall be permitted to remain without such lights after the first conviction shall constitute a separate and distinct offense.”

First, it is apparent from a perusal of the sections above quoted that it is obligatory upon railroad corporations to properly illumine the crossing of their tracks and city streets whether they intersect at above or below grade, and second, inasmuch as the ordinance places the approval of the lights upon the Commissioner of Public Works, I am of the opinion that he is the proper city executive to enforce the provisions of the ordinance.

I may say that Section 1997 above quoted is similar to Section 1763 of the Revised Code of 1897, the legality of the latter section having been confirmed by an opinion of this department of date of July 30, 1903 (Opinions of the Corporation Counsel and Assistants, 1897-1905, Tolman's edition, page 4227).

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Legal Status of Pension Rights of Widow of Patrolman Who Committed Suicide.

October 26, 1905.

THE HONORABLE, The Trustees of the Police Pension Fund,
of the City of Chicago.

Gentlemen:

I have a communication from your secretary, Mr. White, requesting my opinion as to the legal status of a widow of a deceased police patrolman under facts stated in his communication and others which have subsequently come to my knowledge. Briefly they are these:

Oscar Benson, a police patrolman of 10 years standing in this City, was accused by another of having stolen a watch. The officer, incensed at the accusation (there is no

proof as to whether the charge was well founded or not), shot his accuser and killed himself. Thereafter, overcome, apparently, by remorse at his homicidal act, he committed suicide. His widow now applies for a pension and provided her former husband has not by his act deprived her of her right to a pension, she has shown a complete compliance with the pension laws in every respect.

The rights of Mrs. Benson, if any, arise and are fixed by an act approved May 16, 1903, to amend Sections 1, 2, 3, 4, 6, 9, 10 and 11 of an Act entitled "An Act to provide for the setting apart, formation and distribution of a police pension fund in cities, villages and incorporated towns," approved April 29, 1887, in force July 1, 1887, as amended by an Act approved April 24, 1899, in force July 1, 1899, as amended by an Act approved May 11, 1901, in force July 1, 1901.

Section 6 of said Act provides in so far as it is material, that:

"Whenever any member of a police force shall die after 10 years' service therein, and while still in the service of such city * * * leaving a widow * * * then upon satisfactory proof of such facts made to it, said board shall order and direct that a pension of one-half the salary * * * shall be paid to such widow * * * ."

It is conceded for the purposes of this opinion that satisfactory proof of Benson's 10 years' service on the police force, of his being in service at the time of his death, of his death and its manner, of his leaving a widow have all been made to the board, and the question narrows itself to a determination of whether the words "shall die" include and comprehend death from a voluntary act of self-destruction committed without the intervention of insanity.

At the outset it might be well for the purposes of determining the spirit and intent of the act in question to make brief reference to Section 8 of the Act of 1877 unamended by the present act. This section provides in part that

“Whenever any person who shall have received any benefit from said fund shall be convicted of any crime or misdemeanor * * * then such board shall order that such pension allowance as may have been granted to such person shall immediately cease and determine, and such person shall receive no further pension allowance or benefit under this Act.”

I think it is apparent from a perusal of this section that it was the intention of the Legislature to authorize your board to pay a pension only in meritorious cases, and that, at any time, the pensioner might cease his stipend to be cut off by immoral or illegal conduct upon his part. Does the widow of Benson therefore stand in any better position than Benson himself would have stood had he—let us say for the sake of illustration—been receiving a pension as a disabled or superannuated officer and attempted to commit suicide? I am inclined to answer this inquiry in the negative. The plain intent of this pension act, it seems to me, is that merit shall be rewarded and illegal or immoral acts of whatever nature discountenanced. It must be borne in mind that in the present case I treat the act of self-destruction as a felonious death, a case of *felo de se*, and not a death without legal or moral blame—the result of accident, mistake or disease.

I am not unaware that the misfortune of Benson’s deplorable act under the construction I have invoked may, and probably, will be visited upon his widow, a party innocent as to the cause or means of his death. Such fact, however, will be the basis for suggestions which I will make hereafter, but cannot alter my views of the strict legal interpretation of the words used in the statute. A case is readily supposable where a crippled husband, drawing a pension, would pay all the benefit to his wife to be expended by her in the support of herself and the family. She would be, perhaps, as entirely dependent upon the pension as Mrs. Benson will be upon the pension she now seeks. If in such a case the pensioned husband should attempt suicide, and the board in view of the immorality of his act, should cut off his pension, it surely would be no argument against the

legality of your act that the wife, the real beneficiary in that case, was an innocent and injured third person totally unconnected with the causes of his act. I will say, however, that in view of the fact of the paucity of judicial decision in this State, either upon the construction of the act in question or in analogous cases, I would suggest that for the guidance of your board and its successors, a judicial determination be had as to the rights of Mrs. Benson in the premises. Having regard to her unfortunate situation I might suggest that your board furnish her with every facility which your counsel can legitimately give her towards obtaining a speedy determination of her cause, and that possibly the idea might present itself to your board that provided she meet your counsel in a practicable and earnest endeavor for a speedy trial and appeal, her pension be continued, if it has already been granted, or granted, if one has not been so obtained by her, during the pendency of this litigation. It will be expressly understood, however, by her that this act of the board is in the nature of a mere gratuity out of regard to her situation in view of a possible favorable determination of her case to her, and that any such action in the matter as they may take must not be construed by her as estopping them in any way from discontinuing such pension at the conclusion of the suit, or beforehand, if she does not exercise diligence in pressing her case, or from any other reasons which may to them seem fit.

The question being one of doubt and one which can only be permanently settled by a decision from our court of last resort, I do not feel inclined conclusively and absolutely to hold against the rights of Mrs. Benson in the matter, and consequently make the above suggestions, leaving it to be expressly understood by your board that such suggestions shall not in any way control such action as your board may deem wise to take.

Very respectfully,

JOHN W. BECKWITH,

Approved: *Assistant Corporation Counsel.*

JAMES HAMILTON LEWIS,
Corporation Counsel.

Whether Park Boards Need Have Building Permit Before Erecting Building in Park.

October 26, 1905.

MR. GEORGE WILLIAMS, Commissioner of Buildings.

Dear Sir:

Some time ago you asked this department for an opinion as to whether or not Park Boards are obliged to comply with the City ordinances requiring a permit from your department before erecting buildings in their parks, and also a permit to use the water which is used during the erection of such building.

Answering your inquiry regarding the building permit, I am of the opinion that the City has not surrendered or been deprived of complete jurisdiction over the parks, and that the Park Boards have not the power or authority to erect a building in the park regardless of the safety measures adopted by the City. The City has been given the power to legislate on that subject, and I am of the opinion that this power has not been generally abridged by the legislation as to Park Boards.

Regarding the use of water under such circumstances, I do not know of any law or ordinance which exempts the Park Boards from the City's requirements regarding the use of water.

Yours very truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. E. SEXTON,

First Asst. Corporation Counsel.

**In re Validity of Ordinance Licensing Peddlers to
Purchase Direct From Producer.**

October 27, 1905.

HON. JOHN A. RICHERT, Chairman, Sub-Committee of Judiciary Committee.

Dear Sir:

Your letter of recent date to which you attached rough draft of the proposed ordinance authorizing special market peddlers to sell farm produce at the produce market upon payment of a license fee of \$50, such peddler to purchase his goods direct from the producer, was referred to me for an opinion as to legality.

The question presents some difficulties owing to the conflict of authority on the subject and the lack of decisions by the courts of our state which are directly in point. In spite of decisions in other states, however, which at first appear adverse, but in which ordinances are involved which can be distinguished from that proposed, I am of the opinion that an ordinance drawn on the lines indicated by you would be valid.

Under the clause of the Cities and Villages Act which gives the City power to establish markets and provides for the regulation and use thereof, the City may pass all needful ordinances to guard against overcrowding such a market and to promote the general health and welfare of the community in its relation to the business carried on there. Such power is to be liberally construed. (1 Dillon, Mun. Corp., Sec. 380; *St. Louis v. Weber*, 44 Mo. 547; *State v. Gisch*, 31 La. Ann. 544.)

Our Supreme Court in the case of *City of Bloomington v. Wahl*, 46 Ill. 192, held that such an ordinance "must be reasonable, uniform in application throughout the limits in which it has operation; it must not be in restraint of trade; it must not create oppressive monopolies, but must be calcu-

lated to advance the general welfare of the inhabitants of the municipality.”

I should judge that the proposed ordinance was intended to give producers an opportunity to market their product without themselves coming to market; as such it cannot be considered in restraint of trade, but quite the reverse.

There must be no discrimination between persons of the same class.

City of Peoria v. Guggenheim, 61 Ill. App. 374.

McRoberts v. City of Sullivan, 67 Ill. App. 435.

Inasmuch as the producer and the peddler belong to distinct classes, the proposed ordinance is not open to this objection. Neither can it be said that to license peddlers is not a proper exercise of the police power. The revenue derived therefrom is incidental. The power of the City to fix the terms and conditions on which to grant licenses to peddlers is ample for this purpose.

“If the City grants a license, it may impose such conditions and burdens as it may see fit. This latitude of power grows out of the fact that it is discretionary to prohibit the business, or license it on such terms as the City may choose.”

Launder v. City of Chicago, 111 Ill. 296.

Ordinances of a similar nature have been in force in various cities and have been held valid. In Boston an ordinance excluding all except producers living beyond a radius of 20 miles unless permission was obtained from the clerk of the market to sell, was held valid in *Commonwealth v. Nightingale*, Thatcher Cr. Cas. 251.

A similar ordinance was upheld in *Buffalo v. Webster*, 10 Wend. N. Y. 99. In the case of *Rochester v. Pettinger*, 17 Wend. N. Y. 265, the court held valid an ordinance forbidding the sale of fresh meats except by persons licensed, but containing a proviso in favor of farmers, authorizing them to sell meats, the produce of their own farms. Such an ordinance, in its legal aspect, is practically the same as the one proposed.

From the foregoing I draw the conclusion that an ordinance creating and licensing a special class of peddlers who purchased direct from the producer and giving them the same rights as producers within the limits of a regularly established produce market is clearly within the police power of the City. I do not consider the ordinance, as drawn, in good form. In case you desire it, I will draw an ordinance embodying the substance of same and including a penal clause and an enacting clause.

Permit me to suggest that if your committee should determine to prepare and introduce such an ordinance it ought to include the Dayton Street Market as well as the Randolph Street Market.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First. Asst. Corporation Counsel.

Claim of John J. Lyons for Damages Arising from Municipal Dump.

October 27, 1905.

H. B. WHITE, Esq., Secretary, Committee on Finance.

Dear Sir:

Your letter, to which was attached the petition of the attorneys for John J. Lyons concerning the case of *Lyons v. City* for damages arising out of an alleged trespass to certain lots owned by Lyons, was referred to me for investigation and report.

I have examined the files in this case and talked with the attorneys for the plaintiff; also with the former Commissioner of Public Works, the Superintendent of Streets and other persons who are familiar with the facts in the case. The alleged trespass is on account of the City using certain streets in the territory bounded by West Harrison street, Ked-

zie avenue, Taylor street and South Central Park avenue as dumping ground for garbage and ashes.

So far as the legal aspect of the case is concerned, such dumping may or may not constitute a nuisance, according to the facts in the case. The Appellate Court for this district, in a recent case, has indicated what in law would be regarded as a nuisance in the following words:

“In order to create a nuisance, the use must be such as to work a tangible injury to the person or property of another, or such as renders the enjoyment of property essentially uncomfortable. It is not enough that it diminishes the value of surrounding property, or that it renders other property unsalable, or that it prevents one from letting his premises for as large a rent as before or to as responsible tenants. It must be such a use as produces a tangible or appreciable injury to the property, or as renders its enjoyment essentially uncomfortable or inconvenient.”

Flood v. Consumers Co., 105 Ill. App. 559.

In case such dumping was a nuisance which worked a tangible injury to the plaintiff, he must show that the damages sustained by him were of a special character and the damage must have been a special pecuniary damage. If his damages were of the same kind as those sustained by the public at large, differing only in degree, then he could not recover. If, however, he has sustained special pecuniary damage, there can be a recovery in this case.

Village of Winnetka v. Clifford, 201 Ill. 478.

City of Chicago v. Union Bldg. Assn., 102 Ill. 379.

City of E. St. Louis v. O'Flynn, 119 Ill. 200.

Parker v. Cath. Bish., 146 Ill. 158.

City of Chicago v. Burcky, 158 Ill. 103.

The facts in the case, so far as I have been able to ascertain them, are as follows:

About five years ago the City made an agreement with E. A. Cummings, the owner of the subdivision in the above territory for dumping garbage and ashes on the streets in the subdivision for the purpose of filling in the streets up to grade. The City received compensation from Cummings for

doing this. The Superintendent of Streets informs me that the dumping was done during the cold weather; that no offensive odors were apparent at the time; that most of the refuse dumped on these streets was ashes; that two men were employed by Cummings who were on the premises during all of the time that the dumping was in progress, and who burned up all objectionable substances that were dumped there. Since then the streets on which the dumping was carried on were improved and the subdivision was benefited by the raising of the streets to grade.

The damages claimed by Lyons are as follows:

He claims sickness to his wife and family. He could not recover for such damages in this action, and therefore this claim need not be considered. He also claims loss of rents on account of his inability to secure tenants while the dumping was in progress. He further claims that the value of the land was depreciated thereby; that the dumping caused obstructions which prevented him from putting in lumber for the purpose of building, thereby entailing a loss to him, and that he lost the benefit of certain special assessments that he paid and of an option on certain property which he was unable to dispose of on account of the chaotic condition of the subdivision (on the last item he estimates his loss at \$1,100).

It is quite clear that no permanent injury has resulted to the property owned by him on account of the dumping, and if benefits have accrued on account of the same, it is proper for the City, on the trial of the case, to set off such benefits against the losses alleged to have been sustained.

The witnesses to substantiate the facts as set forth by the parties I have interviewed, can be procured in case of a trial in this cause.

I am of the opinion that if the case goes to trial the recovery, if any, will be slight, and recommend that the petition for an adjustment of the claim should be denied.

Yours very truly,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

WM. H. SEXTON,

First Asst. Corporation Counsel.

Legality of Using Sum Appropriated for Meter Merchandise to Pay For New Water Meters.

November 2, 1905.

MR. W. A. SHAW, Acting City Engineer in Charge.

Dear Sir:

We are in receipt of a letter from your predecessor stating that it is the intention of the Department of Public Works to use a portion of the sum appropriated by the City Council for meter merchandise to pay for new water meters to be purchased and installed by the City, and that some meter manufacturers have expressed a fear that this will be illegal as it will be a use of the money for a purpose differing from that for which it was intended by the Appropriation Ordinance, and asking to be informed whether there is any foundation for the fear.

The Appropriation Ordinance distinctly states that this item is appropriated from the water fund, and it has been uniformly held by the courts that it is within the power of the City to make an appropriation from the water fund or any other miscellaneous fund not raised by taxation at any time during the year and to use the appropriation as it sees fit.

We, therefore, answer your question by saying that there is no foundation for the fear that the proposed transaction will be illegal.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Claim of Assistant Superintendent of Streets for Salary Withheld Because of Lack of Funds.

November 3, 1905.

FRANK I. BENNETT, Esq., Chairman, Committee on Finance.
Dear Sir:

I have a communication from the secretary of your committee of recent date requesting the opinion of this department as to the legal position of the City with reference to the claim of former Assistant Superintendent of the Bureau of Streets, Frank W. Solon, for a portion of his salary amounting to \$36.77, which it appears was deducted from July 10, 1901, to October 1, 1901.

In the attached communication from the Superintendent of Streets it is stated that Mr. Solon on August 10, 1901, "was suspended on account of lack of funds, by order of the Commissioner of Public Works dated July 10, 1901. He was reinstated October 1, 1901, by order from the commissioner."

The Department of Public Works is created by Section 1598, Revised Code of Chicago, 1897, and it is therein provided that the department "shall embrace the Commissioner of Public Works, * * * the Superintendent of Street and Alley Cleaning * * * and such other assistants and employes as the City Council may by ordinance, prescribe and establish."

Section 1673, Revised Code of Chicago, 1897, establishes "a division of the Department of Public Works of the City of Chicago to be known and designated as the Bureau of Street and Alley Cleaning, which shall embrace the superintendent of said bureau. * * *"

Section 1674 creates "the office of Superintendent of Street and Alley Cleaning, who shall be the head of said Bureau of Street and Alley Cleaning. * * *"

I think from a consideration of the above provisions that it is clear that the Superintendent of Street and Alley Cleaning is an officer. While it is not necessary for the pur-

poses of this opinion to discuss whether it is such an office as is contemplated by our Constitution and the Cities and Villages Act, I think it must be conceded that it is a municipal office.

People v. Loeffler, 175 Ill. 585.

City of Chicago v. Luthardt, 191 Ill. 516.

Kipley v. Luthardt, 178 Ill. 525.

The office of Superintendent of Street and Alley Cleaning is one classified under civil service, and Mr. Solon was a civil service appointee. If it be that the position in question is an office it follows that the salary of the office is an emolument, and that the legal right to the office carries with it the right to the salary or emoluments of the office. The salary follows the legal title. It is said in the *Luthardt* case, *supra*:

“This doctrine is so generally held by the courts that authorities hardly need be cited.”

The salary of an office, in the eye of the law, is, through motives of public policy, placed beyond the control of the officer to change or interfere with in any manner. He cannot make a contract regarding it nor agree to waive a portion of it in consideration of election or appointment to the office. It is placed by the law beyond his reach. This being so it is clear that if the officer himself cannot intermeddle with his salary or the emoluments of his office, much less can a third person or body. The City Council of this City included in the annual corporation budget for the year 1901 an item for “one Assistant Superintendent of the Bureau of Streets in charge of Street and Alley Cleaning (including transportation) \$3840.00.” (Council Proceedings 1900-01, p. 2039.) The Council thus has set apart a fund for the payment of the officer holding the position of the Assistant Superintendent in charge of Street and Alley Cleaning. The fact that incumbent was suspended on account of lack of funds in no way justified the withholding of a portion of this officer’s salary. Since the funds had been appropriated for the payment of the salary, the money could

not legally be devoted to any other purpose, and was or should have been in the hands of the City Treasurer, subject to draft for the purposes to which it had been theretofore appropriated. As has been said in the *Luthardt* case, *supra*:

“It does not appear that Joyce received the salary pertaining to appellee’s (Luthardt’s) office, and we regard it as immaterial that the appropriation for the police department of the City for the year 1898 is exhausted. If exhausted, it was without authority of law. * * * The appropriation for the salary of appellee for the year 1898 was made and presumably in the hands of the City Treasurer; it does not appear to have been paid to a *de facto* officer holding the office of appellee and performing its duties. It would make no particular difference to the appellant whether appellee’s salary is paid from the appropriation already made or from an appropriation to be made for the purpose of paying the judgment in this case. If the appropriation for the year 1898 is still in the hands of the City Treasurer, *as it should be*, appellee’s judgment may be paid from such appropriation.”

From the Council Order attached to your communication I am given to understand that the sum deducted from Solon’s salary has never been paid to any other person for the performance of Solon’s duties during the period of his separation, and consequently remains or should remain, in the hands of the City unexpended, as it could not legally be expended for any other purpose than the payment of Solon’s salary. The question of acquiescence does not enter into this case, for I am given to understand that Solon protested vigorously, not only to his immediate superior, the then Commissioner of Public Works, but even to the then Mayor. It is a question of some doubt whether, even in the absence of any protest from him, a portion of his salary can be thus deducted, but in view of the facts as above stated, a consideration of this point becomes unnecessary.

As a civil service employe Solon was protected from discharge by Section 12 of the Civil Service Act, and the same section would impliedly prevent his being temporarily suspended, except for some cause touching his personal qualifi-

cations to hold the office. No reasons of this nature were responsible for his suspension. The lack of funds, which apparently was responsible for his separation temporarily from the service, is no legal excuse in view of the fact that a specified appropriation was made for his salary.

I am of the opinion that, under the facts as they have been brought to my attention, a portion of the salary deducted by order of the Commissioner of Public Works from the yearly stipend of Mr. Solon was and has been illegally withheld from him and that he can recover the same from the City in an appropriate action at law.

Yours respectfully,

JOHN W. BECKWITH,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Publication of Notice in Daily Paper of Sale of Real Estate by City.

November 3, 1905.

HON. L. E. McGANN, Comptroller.

Dear Sir:

I acknowledge receipt of your letter of the 25th ult., asking an opinion as to whether in the sale by the City of its real estate, it is required to publish the notice daily for sixty days, if it be published in a daily paper, or weekly for a period covering sixty days.

I am informed by the business agent that the Chicago Journal is the official publication of the City of Chicago; and I am also informed by the Journal Company that it does not issue a weekly paper.

Section 2 of the act concerning this matter provides in part as follows:

“Such ordinance shall specify the location of such real or personal estate, and the use thereof, of whatever

kind the same may be, and before any sale shall be made under or by virtue of any such ordinance, by the City Council of any such City, or the Board of Trustees of any such village, such ordinance and proposal to sell shall be published in one of its daily or weekly papers, for a period of not less than sixty days, and if no paper be published in such city or village, then it shall be published in some paper of general circulation in this State nearest to such city or village. * * *''

(1 Starr & Curtis, p. 816.)

From the language used I am of the opinion that it was not intended by the legislature that the notice, if in a daily paper, should be inserted every day for a period covering sixty days. The language is—"shall be published in one of its daily or weekly papers for a period of not less than sixty days." This language does not import that, if in a daily paper, it shall be a continuous publication. It is intended to cover places either where a daily or weekly paper only is published; and if a weekly paper only is published, then the requirements are complied with by a single publication each week. This would seem to exclude the idea that the notice should be continuous where a daily paper only is published.

I am of the opinion that the publication once a week in a daily paper for a period covering sixty days is a compliance with the statute.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Change of Highway as Platted by Road Commissioners by Later Subdivision and Plat.

November 8, 1905.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

Replying to your letter of November 2d, relative to premises at the southeast corner of Surf street and Linden court, in which the question is asked whether those premises are public or private property, permit me to say.

That the county road, which is shown in the plat attached to your communication, with the certificate of the Commissioners and Surveyor of the Town of Lake View, was established on March 22, 1858. Afterwards, to wit, on June 29, 1869, a plat of a certain subdivision known as Le Moyne Subdivision, was recorded and the plats in the Map Department of the City of Chicago show certain streets which were dedicated as shown by plat hereto attached. If this subdivision changes the location of Surf street the subdivision would govern instead of the plat made by the Road Commissioners of the Town of Lake View.

In the case of *The Town of Ottawa v. Walker*, 21 Ill. 605, the Supreme Court held that the City has exclusive control over the streets within its corporate limits. This question was again decided in the case of *The Commissioners of Highways v. Baumgarten*, 41 Ill. 254. Later in the case of *People v. Cicero*, 118 Ill. 522, and again in the case of *Peoria & P. M. Ry. Co. v. The People ex rel.*, 144 Ill. 458. In the latter case the Supreme Court uses this language:

“When a city is organized under a special charter which gives to it the management, care and control of the streets, highways and bridges within its corporate limits, the commissioners of highways of the town of which the city forms a part have no power to make or improve any highway or bridge in such city, or to interfere with the city in its management and control of the streets or any improvement to be made in or upon such streets.”

In the case of *The County of Cook v. G. W. R. R. Co. et al.*, 119 Ill. 218, the Supreme Court uses the following language:

“The City of Chicago and the Village of Cicero are incorporated under the General Act of 1872, for the incorporation of cities and villages. This act confers upon cities and villages incorporated thereunder, full authority to regulate the use of streets, to provide for and change the location, grade and crossings of any railroad, to require railroad companies to fence their roads, to construct cattle-guards and crossings of streets and roads, to keep the same in repair; to maintain flagmen at the crossings, to compel the roads to raise or lower their tracks, etc. This is to be regarded as vesting in incorporated cities and villages exclusive authority over the matter of railroad crossings over the streets and highways within their limits, and excluding the jurisdiction of the county or town authorities. Repeated decisions of this court are to this effect.”

In the case of *The City of Peoria v. Robert Johnson*, 56 Ill. 45, the Supreme Court discusses the question of abandonment of a road and the maintaining of a street different in its lines from the original county road, which is exactly in point with the case at hand. It was there held that the City had control of the highways and that the abandonment of the old road and the use of the new street in accordance with the dedication by subdivisions was conclusive as to the question of which street should be the public street.

In view of these decisions and the facts and circumstances that are disclosed in this case, I am of the opinion that the property at the southeast corner of Surf street and Linden court lying within the lot lines, as shown by the survey and plat of Le Moyne Subdivision, is private property.

All of which is respectfully submitted.

Yours very truly,

FRANK L. CHILDS,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Police Powers of Health Department Employees.

November 10, 1905.

CHARLES J. WHALEN, M. D., Commissioner of Health.

Dear Sir:

Your request with enclosed letter of Perry L. Hedrick, Chief Sanitary Inspector, for an opinion as to whether under Section 1040 of the new Code it is necessary to have inspectors employed in the Health Department sworn in as patrolmen to preserve their rights under the said section, was duly received.

Upon an examination of the authorities relating to this subject it is my opinion that an oath is not a condition precedent to the right of the health inspector to arrest or cause to be arrested any person who violates any of the provisions of the health ordinance. Section 1040 of the said ordinance provides that

“The commissioner of health, the assistant commissioner, the city physician, the secretary of the health department, and all physicians, employes, or inspectors, *who may be designated by the commissioner of health*, shall have full police powers and shall have the right to arrest or cause to be arrested, any person who violates any of the provisions of this chapter.”

There can be but one construction of this ordinance, viz.: that those men whom the Commissioner of Health shall designate may have the full power of a patrolman in enforcing any provision of the health ordinance and may arrest or cause to be arrested any person who violates any of the provisions thereof. His authority to act is in and conferred by the ordinance. The oath taken by a patrolman is provided for by statute. Neither the statutes nor the ordinances provide for the creation of the office of Sanitary Inspector. Therefore, in my opinion, any person designated by the Commissioner of Health shall have full police powers

by virtue of the aforesaid Section 1040 of the code, and without the additional formality of taking an oath.

Yours very truly,

EDWARD T. WADE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

In re Approving Vouchers in Bureau of Engineering.

November 11, 1905.

L. E. MCGANN, ESQ., Comptroller.

Dear Sir:

Your letter to this department, asking how Mr. W. A. Shaw, who has been appointed engineer in charge of the Engineering Bureau, should approve vouchers and other documents, was referred to me for an opinion.

It seems as though Mr. Shaw is now the acting engineer, the chief engineer, Mr. Ericson being absent; also that Mr. Ericson, at the suggestion of the Commissioner of Public Works, is willing to have his name used for the approval of vouchers, etc., but that he is not willing to be responsible for such vouchers unless his personal signature is attached to same.

In view of the fact that the City Engineer is not under bond and that therefore no additional security to the City would result from the use of his name, I see no reason why Mr. Ericson's name should be used for this purpose. It would not be fair to him nor result in any additional check on the employes of that department or on contractors holding claims, to have his name used while he is not in charge of the work or acting as the head of the department. The ordinances place the responsibility for the approval of vouchers and other documents on the Comptroller, who is not supposed to issue warrants until satisfied of the correctness of same. See Section 33 of the new code. Under the cir-

cumstances, therefore, it is within the discretion of the Comptroller to require the approval of such documents in any manner that he deems necessary in order to avoid mistakes or irregularities.

I am of the opinion that it is far better for the person who has actual charge of the work to sign in his own name, in which event he cannot divide responsibility with anyone else. I believe, therefore, that the vouchers and other documents should be signed by Mr. W. A. Shaw as acting engineer.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Attempted Vacation of Prescott Street — All Lot Owners Must Join in Vacation.

November 11, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.
Dear Sir:

Replying to your letter of the 13th ult., with enclosed report of Superintendent of Maps relative to the vacation of the 66-foot strip south of and adjoining block 15 in Irving Park, I beg to advise you that it appears from pages 3, 4, and 5 of the abstract which you furnish that the plat of the subdivision of which this strip is a part was recorded on September 22, 1869; that the lots in the west tier of blocks are 144.41 feet in length; that the west end of Prescott street in said subdivision does not connect with a street or alley in the adjoining subdivision; that on January 27, 1870, a little more than three months after the plat was recorded, the owners of a portion of the subdivision, J. S. & A. E. Brown, filed for record an instrument purporting to vacate certain streets, among which was the one in question.

The right to vacate a plat, or portion thereof, was then governed by the Act of 1847, which was in part as follows:

“Sec. 1. That in all cases where persons have heretofore, or may hereafter, lay out towns, or additions to towns, or subdivisions of town lots, and the plats or maps thereof shall have been recorded, they, their heirs, assigns or grantees may, at any time before making sale of any single lot or lots, by executing a writing and causing the same to be recorded in the office in which the plat or map was recorded, declare such map or plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat or map so vacated, and to divest all public rights in the streets, alleys, commons and public grounds laid down or described in such plat or map; and in cases where any single lot or lots have been sold, the plat or map may be vacated as herein provided, by all the owners of lots joining in the execution of the writing aforesaid; *Provided*, that no such writing shall be recorded until the execution thereof shall have been acknowledged or proved as is or may be required in respect to deeds.

* * * * *

“Sec. 3. Any part of a plat or map of a town, addition or subdivision may be vacated under the provisions and subject to the conditions herein contained.”

Saunders v. City of Chicago, 212 Ill. 210.

I am informed that the tract of land platted as Irving Park was owned by the Race, Brown and Wheeler families, and that after the subdivision was laid out, the interests of the different owners was again parceled out by quitclaim deeds from the other subdividers. The Races and Wheelers did not join with the Browns in executing the instrument of vacation; but it appears from page 5 of the abstract that they joined in a quitclaim deed to the Browns of their interests in the street in question, among others. This deed bears the same date as the instrument of vacation filed by the Browns, and in my opinion is equivalent to joining with the Browns in the execution of the instrument of vacation. The validity of this vacation depends upon whether or not lots were sold by either of the subdividers prior to the recording of the vacating instrument. From an examination of

the plat index in the office of the Chicago Title & Trust Company (there being no record in the Recorder's office), I find that about one hundred conveyances were made by William B. Race, Jr., and by Charles T. Race.

Under the law as it then existed, the power of vacation of a portion of this plat resided jointly in the owners of the subdivision and the individual lot owners,—and not merely in the owners of the subdivision, and as this vacating instrument (which was ante-fire and a copy of which is not available) was executed and recorded subsequent to the sale of lots, and as the individual lot owners did not join therein, I am of the opinion that such attempted vacation is void and of no effect.

Saunders v. City of Chicago, supra.

Town of Lake v. Le Bahn, 120 Ill. 101.

The fact, if it be a fact, that the Town of Jefferson did not immediately accept the dedication would not relieve the Browns or their assigns of the obligation to keep the street in question open. The map of the subdivision defines this strip as a street, and lots were sold with reference to it and the purchasers of such lots have a right to have it remain open, free from the interference of the proprietors.

Yours respectfully,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Attempted Withdrawal of Sureties From Bond.

November 13, 1905.

JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

Your letter of recent date concerning the notice served by two of the sureties of M. H. McGovern, to which was

attached a copy of said notice, was referred to me for an opinion.

It seems that M. H. McGovern entered into a contract with the City for the construction of a sewer in Lawrence avenue, and that said contract was covered by a bond which John E. Burns and Edward L. Thornton, together with many others, signed as sureties. The two sureties named have now notified the City through the Commissioner of Public Works that their signatures were obtained to said bond through the misrepresentations of their principal, the contractor, and that they refuse to be longer bound by their bond. The notice also states that the contractor has not yet begun work on his contract. While I am informed that the contractor has begun the work and has up to the present time lived up to the requirements of his agreement and all the covenants in said contract, nevertheless, in view of the fact that the claim is made that notice was served on the City before the contractor started on the work, it is necessary for your department and all City officials who have any connection with this matter to proceed with the utmost caution and strictly enforce all the provisions of the contract; otherwise the rights of the City may be jeopardized.

The sureties cannot discharge themselves from liability on this bond by merely giving notice of their intention to withdraw therefrom. Neither does the fact, if such is the fact, that the principal on this bond made false representations to them, affect the rights of the City in the slightest degree, since it is not claimed that the City was (nor would it be possible for the City to be) a party to such false representations.

“A surety cannot urge the false representations of his principal to induce him to become such as a defense, without connecting the obligee with such representations.”

Davis S. M. Co. v. Buckles, 89 Ill. 237.

Ladd, et al. v. Board of Trustees, 80 Ill. 233.

W. N. Y. Life Insurance Co. v. Clinton, 66 N. Y. 326.

Lucas v. Owens, 113 Ind. 521.

Home Insurance Co. v. Holway, 55 Iowa, 571.

Mason v. Buchtel, 101 U. S. 633.

It is, therefore, quite clear that up to the present time the sureties on this bond would be liable to the City in case there had been a breach committed. It is also clear that in the absence of such breach, if the City does nothing in the future which will operate as a discharge of these sureties, they will continue to be liable in spite of this notice.

If there should be a breach by the contractor, however, it may be necessary, in order to preserve its rights against these sureties, that the City should at once forfeit the contract since any material variance or enlargement as to time or otherwise would result in a discharge of these two sureties. On the other hand, in the absence of any breach of the contract, the City cannot rescind same, since the bond is still in force and, so far as the amount and sufficiency of the security is concerned, is satisfactory.

It is true that under Section 1856 of the code the contractor can be required to give a new bond on condition of the contract being forfeited in case

“at any time the sureties or either of them upon such bond shall become insolvent, or shall in the opinion of the Commissioner of Public Works be unsatisfactory, or unable to respond in damages in case of liability on such bond.”

But in the absence of judicial interpretation of this section of the code, it would be unsafe to rescind the contract on the ground that the bond is “unsatisfactory,” because it may be held that this word applies to the responsibility of the sureties and not to such a condition as has arisen in this case.

I therefore advise the following course in this matter: If the work was commenced before this notice was received and the contractor has fulfilled his contract up to the present time, notify the sureties that the work was in progress at the time the notice was received, that the City will require the contractor to continue the work and will insist on a

strict performance of the contract, and that the sureties will be held liable in accordance with the terms and conditions of the obligation which they entered into.

At the same time it would be well to request the contractor, in view of the circumstances, in case the bond in your opinion is not sufficient if these two sureties were omitted, to give an additional bond for the purpose of amply securing the City, being careful, however, in the notice to the contractor, to avoid saying anything which could be construed as a release or waiver of the rights of the City as against these two sureties. In case at any time while the work is in progress there is a breach of the contract, declare a forfeiture at once, and notify the sureties that they will be held liable for any damage that may accrue to the City on account of said breach.

If the contractor, in response to the request for additional security, files such additional bond, it will of course obviate all difficulties; if not, however, you will have to exercise the strictest supervision over the work, since it is possible that a breach without prompt action thereon, or variance in the terms of the contract, or the suspension of the work until after the time limited for the performance of same, may operate as a discharge of these two sureties.

I would suggest further that you submit the notices to the sureties and the contractor to this department before sending them out.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Washington Heights—Pleasure Driveway.

November 14, 1905.

JOHN M. COLLINS, ESQ., General Supt. of Police.

Dear Sir:

I have your communication of recent date in which you state you are informed that the citizens of the village known as Washington Heights propose to test the ordinance passed November 3, 1890 (prior to the annexation of the said village), providing for the designation of a street as a pleasure driveway, and requesting an opinion as to what section of the revised code or the statutes a police officer could proceed under to arrest any person violating the said ordinance.

An act entitled "An Act to provide for pleasure driveways in incorporated cities, villages and towns" (approved and in force March 27, 1889), authorizes City Councils and Boards of Trustees to designate by ordinance not to exceed two streets to be used for pleasure driving only, and provides that the corporate authorities may by ordinance regulate the kind of vehicles that shall be allowed upon the same, and to exclude funeral processions, business traffic and to prescribe fines and penalties for the violation of the ordinance.

You further state that the authorities of the Village of Washington Heights, acting under the rights conferred by the above statute, duly passed an ordinance on the 3d day of November, A. D. 1890, designating Longwood avenue in said village to be a pleasure driveway. In my opinion that ordinance was kept in force upon annexation to the City of Chicago, so that the Chief of Police of this City is vested with power to enforce the ordinance.

The latter half of Section 1760 provides that the several members of the police force of the City

"shall have power to arrest all persons in the City found in the act of violating any law or ordinance or aiding or abetting in any such violation, and shall arrest any person found under circumstances which would warrant

a reasonable man in believing that such person had committed or is about to commit a crime.”

Accordingly under this section of the revised code a police officer is authorized to arrest any person found violating the ordinance referred to in your letter to this department.

Yours very truly,

EDWARD T. WADE,

Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,

First Asst. Corporation Counsel.

Right of Meat Inspectors to Enter Premises for the Purpose of Inspecting and Condemning Unwholesome Meat.

November 14, 1905.

CHARLES J. WHALEN, M. D., Commissioner of Health.

Dear Sir:

I acknowledge receipt of your inquiry of the 6th inst. as to the right of the City's meat inspectors to enter premises for the purpose of inspecting and condemning unwholesome meat.

Sections 1153 and 1161 of the revised code contain the authority for so doing and are as follows:

“1153. All meat condemned in the City by Government or State meat inspectors shall be destroyed under the supervision and subject to the directions of the City meat inspectors; and the City meat inspectors or any one of them are hereby empowered to seize, condemn and destroy any tainted or unwholesome meat found in the City; and the City meat inspectors or any one of them are hereby authorized to enter any building, structure, or premises in the City to inspect and examine any meat contained therein.”

"1161. Every person being the owner, lessee or occupant of any room, stall, freight house, cold storage house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food, shall be stored or be kept whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal or agent, in the care of, or in respect to the custody or sale of any such article of food supply, shall put, preserve and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employes of the Health Department of the City to enter any and all such premises above specified at any time of any day, and to forthwith seize, condemn and destroy any such putrid, decayed, poisoned and infected food, which any such inspector may find in and upon said premises."

The above sections are a valid exercise of the police power and confer ample authority on your inspectors to enter such premises to inspect and condemn unwholesome food.

Yours truly,
MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:
WM. H. SEXTON,
First Asst. Corporation Counsel.

The Custom of Submitting to Aldermen of Ward Applications for Permits to Set Poles and String Wires.

November 14, 1905.

WILLIAM CARROLL, City Electrician.

Dear Sir:

I have your request for an opinion as to whether you are legally bound to forward applications for permits to set poles and string wires to the aldermen of the ward in which the proposed work is to be done.

Section 2166 of the Revised Code of 1905 provides:

“PERMIT TO ERECT REQUIRED.) No person or corporation shall erect, construct, maintain or use any pole, line or wire, or electric conductor of any description whatever within the City, without first having obtained a permit therefor, under a valid and existing ordinance, from the Commissioner of Public Works, which permit shall be countersigned by the City Electrician, under a penalty of one hundred dollars for each and every offense; and each and every day any such telegraph pole, line or wire, or electric conductor, shall be maintained or used after the first conviction shall constitute a new and separate offense.”

Section 2167 provides:

“REQUIREMENTS BEFORE PERMITS CAN BE ISSUED.) All applications for permits to erect poles in the streets and alleys of the City shall provide that the City may use the poles to be so erected and attach thereto such necessary cross arms, wires or other electrical appliances as may be deemed necessary for the electrical service of the City, and no permit shall be issued by the Commissioner of Public Works for the erection of such poles, in which the application and permit does not provide for the privileges required by the City as herein contained.”

I am unable to find any section in the code which makes it compulsory upon you to refer applications for permits to set poles, etc., to any alderman. The ordinance is

explicit in its requirements and, if it has been the custom of your department to forward such applications to the aldermen before issuing permits, it is a custom which is not authorized by law, but which may possibly be justified by the exigencies of the conditions attendant upon the application. In other words, the ordinance does not compel the reference of such applications to the aldermen of the respective wards; nor does it forbid it.

The ways and means for granting these permits are, as I have stated, clearly defined in the sections above referred to.

Respectfully,
EDWARD T. WADE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

**Resale of Furniture by Second-Hand Dealers. Pen-
dency of Appeal No Bar to Prosecutions
of Similar Offenses.**

November 15, 1905.

JOHN E. TRAEGER, ESQ., City Collector.

Dear Sir:

I acknowledge receipt of your letter of the 14th inst. with attached communications from Police Captain Healy, asking the opinion of this department on two propositions:

First: Whether a person who sells furniture on the installment plan and who re-acquires the same on foreclosure proceedings and resells it, is a second-hand dealer.

I am of the opinion that if it was new furniture at the time of the sale by the vendor in question, the resale by the same vendor would not make such person a second-hand dealer within the meaning of the ordinance. If, however, such person is dealing in both new and second-hand furni-

ture, and the furniture in question was originally purchased by the vendor as second-hand goods, its sale by that person would bring such goods within the provisions of the ordinance and would require such person to have a license.

Section 2030 of the Revised Code provides, in part, as follows:

“No person shall keep a place for the purchase or sale of second-hand clothing, second-hand household goods, * * * or other second-hand article of any kind or description, nor shall any person trade, barter, deal in, or carry on the business of dealing in any such second-hand articles as hereinbefore described, without being specially licensed for such purpose; * * *”

Second: Whether an appeal by the defendant from a judgment and the pendency of that appeal bars further prosecution for an offense of a similar nature.

I am of the opinion that it does not. The appeal does not vacate the judgment; its only effect is to operate as a stay of the enforcement of the judgment. It is a bar to further litigation on that offense. However, it has no effect on subsequent actions based on further violations of the same section of the code. The hands of the City authorities can not be tied in such a way.

Yours truly,
MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Construction of Ordinance Licensing Livery Stables as Including Garages.

November 17, 1905.

GEORGE WILLIAMS, Esq., Commissioner of Buildings.

Dear Sir:

Your letter to this department inquiring whether a certain building for which application for permit has been

made comes within the definition of a livery stable, as defined in Section 2367 of the new code, was referred to me for an opinion.

Your letter states that the application gives the location of the proposed garage as 1632 to 1664 Graceland avenue, and that the proposed building is to be for the use of the tenants of the building fronting on Graceland avenue only. Since receiving your letter, I have been informed that a protest was filed in your office concerning this permit; also that the proposed building is not, in fact, to be erected on the rear of lots on Graceland avenue, but on the rear of lots on Bittersweet place which adjoin the Graceland avenue lots; that the application should therefore be for a permit to erect a garage on lots which front on Bittersweet place. I am also informed that the building extending from 1632 to 1664 Graceland avenue is a large apartment building containing eighty or ninety apartments.

Section 2367 of the Code includes in the definition of a livery stable a place "where carriages, cabs, hacks, automobiles, auto cars or any vehicle, whether drawn by horses or not, are kept, or let for hire or reward, etc." It seems quite clear that the proposed building comes within this definition, since automobiles are to be kept there for the use of parties who are not either the owners or tenants in the building for which permit is asked. It may be true that it is intended to limit the use of the said building to only a part of the public, but it would nevertheless be a public barn.

I come to this conclusion not only because in a strict construction of the section of the code mentioned above the building would be included, but also because our Supreme Court has held in the case of a club dispensing liquors that, although the sale is limited to the members of the club, such a place is nevertheless within the definition of a dramshop as contemplated by statute.

People v. Law & Order Club, 203 Ill. 127.

I think this case is analogous to the one I have cited, and therefore give it as my opinion that the proposed build-

ing is a livery stable, and that frontage consents are necessary, as prescribed by Section 692 of the code, before the permit can issue.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Release of Sureties on Contractor's Bond by Changing the Terms of the Contract.

November 17, 1905.

JOSEPH M. PATTERSON, Esq., Commissioner of Public Works.

Dear Sir:

The letter of M. H. McGovern addressed to you, in which he asks consent from you to enter into a partnership with Joseph Hanreddy for the construction of the Lawrence avenue conduit, was handed to me with a request to give you an opinion concerning same.

You will, no doubt, remember that two of the sureties of Mr. McGovern, whose names are signed to the bond he gave to the City covering this contract, have notified the City that they will no longer be bound by same; and while, as I stated in my letter concerning same, this notice has not the legal effect of releasing such sureties, it nevertheless might result in that if any action which is not clearly and specifically set forth in the contract or the bond is taken by the City.

The contract provides that the agreement entered into for the work shall not be assigned, and no part of the work shall be sub-contracted, without the written consent of the Commissioner of Public Works, and, further, that in no case shall such consent relieve the contractor from the obligations entered into by him. A strict construction of this

language would not permit such a thing as taking a partner in the enterprise, since that would not be assigning the agreement, nor would it be sub-contracting a part of the work. It is, therefore, a question whether this would not be a material change which would release the sureties from their obligation. A strict construction of the bond which covers breaches of the contract, or failure to perform by the contractor, his "assignee or assignees, sub-contractor or sub-contractors" might also result in the conclusion that the sureties are not bound by such a change as is contemplated.

I see no reason why this contractor should require the City to enter into the agreement which he has made with Mr. Hanreddy. That can be carried out without reference to Mr. McGovern's obligations to the City.

In view of the fact, therefore, that notice has been served by the sureties, as stated above, I would recommend that the consent which Mr. McGovern asks be refused. It is entirely within the power of the Commissioner of Public Works to refuse this consent, since the contract in specifying that such written consent is required gives him the option of withholding it if he sees fit.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

Walls and Fences Enclosing Railroad Tracks and Rates of Speed Within the City.

November 21, 1905.

HONORABLE MILTON J. FOREMAN, Chairman, Committee on
Judiciary, City Council.

Dear Sir:

In response to your request of even date I have examined the ordinance introduced at the meeting of the Council held November 13, 1905, and referred to the Judiciary Committee, amending Sections 1978 and 1994 of the Revised Municipal Code of 1905. I have prepared and hand you herewith a substitute for said ordinance. I am of the opinion that said substitute ordinance is valid and is a proper ordinance for the Council to pass.

During the work of revising the Municipal Code the provisions relating to enclosing walls and fences along railroad tracks were retained, while the section of the code permitting railroads which had constructed such enclosing walls or fences to operate at various rates of speed in the different districts into which the City was divided was inadvertently omitted. It is not just that the burden placed upon the railroad companies should be retained and the privileges which accompany such burdens should be withheld. The substitute ordinance in question has been prepared with the sole purpose of restoring the provisions that existed prior to the passage of the present Revised Code. Where enclosing walls and fences have not been erected the speed of trains is limited to ten miles an hour, except where tracks are elevated. Where enclosing walls and fences have been erected the three districts formerly existing within the City have been restored, and trains are allowed to run at the rate of speed permissible under Section 1748 of the Code of 1897.

I have also added a paragraph at the end of Section 1994 providing that where the railroad companies fail or neglect to build enclosing walls and fences in compliance with any

order or ordinance of the City Council so to do, the City of Chicago may construct the same at the company's expense. This paragraph was embodied in an ordinance passed January 30, 1905 (See Council Proceedings, p. 2253).

In conclusion I beg to say that the passage of this substitute ordinance merely restores the provisions of the Revised Code of 1897 and amendments thereto as they existed prior to March 20, 1905, the date of passage of the present code, which were intended by this department and the revisors of the code to have been retained in the new Revised Code:

Very truly yours,

WM. H. SEXTON,

First Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Duty of City to Reconvey Land When Contingency Provided in Deed Has Occurred.

November 22, 1905.

HENRY F. EIDMANN, ESQ., Chairman Subcommittee, Committee on Finance.

Dear Sir:

I acknowledge receipt of your request of the 17th inst. for an opinion as to whether the City is obliged to reconvey lot 21 in block 1 of the Board of Trade subdivision No. 1 in Washington Heights, the contingency provided for in the deed having occurred; and, if so, to whom the conveyance should be made.

I find that the deed to the Village of Washington Heights provides in part as follows:

“* * * it being expressly understood that this deed is executed and delivered upon the condition that said lot shall be used for the construction and maintenance thereon of a water tank that shall be used and may be necessary in the operation and maintenance of

a general water system under and operated by said village, and for no other purpose, and that said village shall not at any time erect, construct or maintain any pumping works on said lot; and it is expressly understood that if said lot shall be used for any purpose other than for water tank and the proper maintenance thereof, that the title to said lot and the right to immediate possession thereof shall at once revert to and be vested in said Almon Brooks, his heirs and assigns."

I am of the opinion that the City is not obliged to convey to Brooks on the happening of the contingency provided for, if he be still the remainder-man, for when the City's interest in this estate has determined, the remainder-man may declare a forfeiture. He can, however, release his interest, if he sees fit. In such case it would be wise to take a release from the remainder-man covering all possible damages which might have occurred to the interest of such remainder-man.

The proper party to whom to convey is the one in whom the remainder is now vested because of the happening of the contingency, which may be Brooks or his heirs.

24 Am. & Eng. Ency. of Law (2d Ed.), 410.

Yours truly,
MICHAEL F. SULLIVAN,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Claim to Recover Money Paid Under Alleged Invalid Ordinance.

November 24, 1905.

FRANK I. BENNETT, Esq., Chairman, Finance Committee.

Dear Sir:

I have your favor of October 3, A. D. 1905, in which you request an opinion as to whether the City is legally

bound to refund to the Calumet Insurance Company the sum of \$232.18, the said sum representing the so-called 2 per cent tax which the said company paid to the City of Chicago in accordance with the terms of Section 900 of the Revised Code. Section 900 of the code provides that:

“Any such corporation, company or association not incorporated under the laws of the State of Illinois, which is engaged in the City in effecting fire insurance, shall pay to the City collector, for the maintenance, use and benefit of the Fire Department of the City, a sum of money equal in amount to two per cent per annum of the gross receipts received for premiums by any and all agents of any such corporation, company or association during the year ending on every first day of July, for any insurance effected or agreed to be effected in said City by or with any such corporation, company or association during such year.”

The letters accompanying your request disclose the fact that the Calumet Insurance Company paid the above amount voluntarily without duress and evidently while laboring under the impression that the said company was liable under the ordinance for the payment of such sum.

As to whether the Calumet Insurance Company was or was not an Illinois corporation at the time the said payment was made was a question of fact best known to the officers of the company.

As to whether the Calumet Insurance Company was liable under the ordinance for the payment of the aforesaid tax was a question of law, the burden of the interpretation of which was placed upon the insurance company.

The rule laid down by our courts is as follows:

“A party who has paid voluntarily, under a claim of right, shall not afterwards recover back the money, although he protested at the time against his liability. But it is otherwise when a party is compelled, by duress of his person or goods, to pay money for which he is not liable. It is not voluntary, but compulsory, and he may rescue himself from such duress by payment of the money, and afterwards on proof of the fact, recover it back.”

Conkling v. City of Springfield, 132 Ill. 423.

And again we find that to authorize a recovery of money paid as a tax three things must concur: First, that tax must have been illegal and void; second, it must have been paid under compulsion or its equivalent; third, it must have been paid over by the collector for the use of the City.

Lyons v. Cook, 9 Brad. 545.

Cooley on Taxation, 565.

If the tax was not paid by compulsion it cannot be recovered back.

Cooley on Taxation, 566.

The Calumet Insurance Company does not contend that the tax was illegal *per se*, nor that the money was paid under compulsion. It admits either one of two things, namely: its ignorance of the law or the carelessness of its officers, the latter of which we must construe as a mistake of law. Accordingly it is my opinion that the City of Chicago is not liable for the return of the above sum paid by the Calumet Insurance Company under the provisions of Section 900 of the code.

I return herewith the letter of October 3d, written by your Mr. White; the letter of August 15th, written by John E. Traeger, City Collector; letter of Fred S. James & Company of August 10th; letter of L. E. McGann, Comptroller, of August 16th, and the receipt in duplicate of the City Collector to Fred S. James & Company for \$232.18 of the date of August 1, 1905.

Respectfully,
EDWARD T. WADE,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
First Asst. Corporation Counsel.

Exclusion of Incurrible Persons From Public Playgrounds.

November 24, 1905.

A. W. O'NEILL, ESQ., Secretary, Special Park Commission.
Dear Sir:

Your letter to this department concerning the exclusion of certain incurrible persons from the public playgrounds of the City was referred to me for reply.

You state in your letter that the Superintendents have on some occasions, as a last resort, rather than subject such persons to the disgrace of an arrest, excluded them, and have found this a more satisfactory measure of discipline and punishment than having them arrested. You also ask whether such action on the part of the Superintendents is legal, and in case it is not, whether an ordinance can be framed giving such Superintendents the necessary power.

I am of the opinion that it is beyond the power of the City to exclude anyone from the public playgrounds, except temporarily in so far as may be necessary to preserve the peace, or as the safety of the public may require.

The law governing the regulation of highways applies to public parks and playgrounds as well. It is true that the City may exercise a more complete control over such places than over the streets, and an ordinance which might be held unreasonable as to the use of a street would be regarded as reasonable in the case of parks or playgrounds. To illustrate, parades may be prohibited, the beating of drums or shouts such as are sometimes indulged in by religious enthusiasts may be forbidden, making speeches may be prevented, etc. But in its last analysis, this enlarged power is one of degree and does not go to the essence of the right to regulate by the enactment of reasonable ordinances, which is the same in both cases.

Andrews' American Law, Sec. 466.

Davis v. Massachusetts, 167 U. S. 43.

In re Flaherty, 27 L. R. A. 531.

While, therefore, it is within the power of the City authorities to establish reasonable regulations, the exclusion of any person, no matter how often he may have offended previously, would be an invasion of his constitutional rights. Such regulations must apply uniformly to all.

I am therefore unable to draw an ordinance which would invest the Superintendents with the authority which you suggest.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Bridges Across Alley Between Wabash Avenue and State Street.

November 25, 1905.

JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

I have your note referring to the ordinance of July 6, 1896, authorizing Schlesinger & Mayer, their successors and assigns, to build three bridges across the alley between Wabash avenue and State street, in which you ask whether Carson Pirie Scott & Co., their successors, have a right to now construct two bridges.

The ordinance is broad enough in its terms, but under the rule laid down by the Supreme Court in the case of *Field v. Barling*, 149 Ill. 556, it is utterly void and without any value whatever, for at that time the City did not have power to pass ordinances of that kind. The fact that the City today has such power does not give any life to this ordinance.

It will be unlawful to construct or to permit the construction of the proposed bridges under this ordinance.

I return herewith the copy of the ordinance submitted by you together with the plans you left upon my desk.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:
JAMES HAMILTON LEWIS,
Corporation Counsel.

**The Licensing of Companies Engaged in the Business
of Selling Lime, Cement, Sand, Gravel and
Lath Under the Ordinance Regulat-
ing Lumber Yards.**

November 27, 1905.

TO THE HONORABLE, THE CITY COUNCIL.

Gentlemen:

At the last meeting of your Honorable body (November 20, 1905), an order was adopted which is in part as follows:

“WHEREAS; there are a number of companies engaged in the business of selling lime, cement, sand, gravel, and other building materials, which said companies also deal in lath”;

It is then recited that the City through its license officers is attempting to compel the said companies to pay the license fee of \$100 annually which is required under Section 1379 of the Revised Municipal Code of Chicago of 1905, of those who keep, carry on or maintain lumber yards, or other places where lumber is sold. The conclusion of said order is as follows:

“WHEREAS, it is contended by said companies that they are not liable for said license fee under said Section 1379; therefore it is ORDERED that the matter be referred to the Corporation Counsel for investigation, and that he furnish the Council with an opinion as to the liability of said companies to pay such license fees.” (Council Proceedings, November 20, 1905, page 1543.)

Section 1379 of the said code reads in part as follows:

“No person or corporation shall keep, carry on, conduct or maintain a lumber yard or other place where lumber is sold from yard, car, vessel or place, or where lumber is stored for the purpose of seasoning or drying the same, or where second-hand lumber is stored or kept for sale, without first having obtained a license therefor, as hereinafter provided.”

The section then provides for an application in writing to the Mayor for a license, and the payment of a license fee to the City Collector at the rate of \$100 per annum, and concludes with the following provision:

“If such applicant shall desire or intend to keep or conduct more than one lumber yard or place for the storage of lumber, a license shall be secured for each lumber yard or place, and the full license fee as herein fixed shall be charged for each such license so issued.”

By Section 1381 of the code, a penalty is provided for the violation of the preceding provisions relating to lumber yards.

Pursuant to the order of your Honorable body, I respectfully submit my conclusions as to the liability of the companies therein referred to to pay the fees prescribed by the ordinance.

Section 1 of Article V of the Cities and Villages Act (Hurd's Revised Statutes, 1903, Chapter 24, page 295) gives to the City Council the following powers, among others:

“*Ninety-first*—To tax, license and regulate auctioneers, * * * lumber yards, livery stables, public scales, money changers and brokers.”

A glance at the ordinance in question is sufficient to make it plain that it is passed by the City Council in the exercise of the power of taxation delegated to it by the General Assembly, rather than in the exercise of the police power. In short, the ordinance is a revenue measure. This being so, there is no need of taking time to discuss the reasonableness of the amount of the fee fixed by the ordinance. The City Council was vested with the power to “*tax*” lumber yards, and could therefore fix the occupation tax or license fee at

any sum it saw fit at its discretion, short of such an amount as would result in a prohibition of the carrying on of the business of keeping or conducting lumber yards.

The case of *Holland v. City of Chicago*, 108 Illinois, 496, has sustained the validity of a tax imposed by an ordinance which was passed under the clause of the statute above set forth.

The main question presented, then, is whether those engaged in the business of keeping places for the selling of laths are subject to the tax and must obtain the license required by the ordinance. I do not pretend to say that the question is free from doubt, but for the reasons hereinafter set forth I incline to the opinion that those conducting yards or other places for the sale of laths are subject to the provisions of Section 1379 of the Revised Municipal Code. It is to be noticed that the section uses only general words and does not attempt to enumerate any particular kinds of lumber. Its provisions relate to "a lumber yard or other place where lumber is sold." I think therefore it was the intention of the City Council that dealers in all kinds of lumber whatever should procure license fees under the ordinance. The word lumber conveys the idea of a manufactured product apart from mere wood or logs in an unmanufactured state. It should be held to include any timber sawed or split or otherwise prepared for use, either boards, planks, beams, laths, shingles, staves or hoops."

See:

Williams v. Stevens Point Lumber Co., 72 Wis. 487; 4 N. W. 154.

Ward v. Kadel, 48 Ark. 174-180.

In a statute which gives a lien on lumber to any person performing manual labor thereon, for or on account of the owner, agent or assignee, the word "lumber" includes shingles.

Gross v. Eidell, 53 Wis. 543; 11 N. W. 9; and see, *West Branch, etc. v. American I. C. Co.*, 183 Penn. 366, 38 Atl. 1081.

I am aware that there is an early decision in another state to the effect that the term "lumber" does not include laths. What has already been said as to the scope of the city ordinance relating to persons keeping or conducting lumber yards meets the objection, if it be made, that the words "lumber yards," as used in the statute, are to be understood as including only particular kinds of lumber, such as joists, large beams, etc.

In view of what has been said, the license officers of the City should proceed with the enforcement of the ordinance.

Respectfully submitted,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Provisions of Building Ordinance Applicable to Department Stores in Existence Before Ordinance Was Passed.

November 28, 1905.

GEORGE WILLIAMS, Esq., Commissioner of Buildings.

Dear Sir:

Your letter of recent date, in which you ask whether any of the provisions of the Revised Municipal Code relating to buildings of Class VII are retroactive and applicable to buildings used for department stores before the new ordinance went into effect, was assigned to me with instructions to advise you fully in regard to same.

The legal aspect of this matter has already been fully set forth by this department in an opinion written by Hon. Edgar B. Tolman which appears on page 696 of the "Opinions of the Corporation Counsel and Assistants." As a general rule statutes and ordinances are not retroactive unless the intent to make them so is expressed or plainly appears

from the context. There are some exceptions to this rule, but they do not apply in the present instance. We must therefore consider the question from what appears on the face of the ordinance.

Section 634 of the code states explicitly that alterations shall not be required in the construction or equipment of buildings in existence at the time of the passage of the ordinance unless these shall not have sufficient or adequate means of ingress or egress. It also provides that if it shall appear to the Commissioner of Buildings that such means of ingress or egress are inadequate that he shall direct such alterations as are necessary to promote the safety of the occupants and the public. Also that if there are structural changes made in a building which will transfer it from one class to another, then all the provisions of the ordinance must be complied with.

This section is intended to give the Commissioner of Buildings a large discretion, which must however be reasonably exercised. It also answers, in a general way, the question you ask. Aside from such alterations as the Commissioner of Buildings may require by reason of the authority vested in him by Section 634, I should say that all provisions of the ordinance which do not call for structural changes or changes in equipment apply to buildings which were in existence when the ordinance was passed.

I would therefore say that the following provisions of the sections named below are to be enforced in all cases, whether the building was in existence at the time the ordinance was enacted or not:

Section 451, in so far as it prohibits the use of more than 12 stories above the street grade except under certain conditions, and in so far as it prohibits the use of more than one floor of the cellar for sales rooms.

Section 461, in so far as it prohibits the obstructions of aisles or passageways and requires illumination and signs.

Section 462, which applies to the width of aisles.

Section 463, which applies to exit and fire escape signs and lights.

Section 470, which relates to fire drills of employes.

I do not regard the installation of lights and signs as such an alteration in the equipment of a building as would be prohibited by Section 634. Nor do I so regard the widening of aisles as provided for in Section 462, but if there were doubt as to the latter, Section 634 in any event gives the Commissioner of Buildings the right to require this if he deems it necessary.

The conclusions I have reached in the above opinion are based on no further authority than my own construction of the ordinance. There has been no judicial interpretation to guide me. I would, therefore, advise that in all cases where notice is given for the purpose of enforcing the sections I have designated, if there is a protest, a hearing be given in regard to same and the matter be submitted in each case to this department for further consideration.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

City Not Liable for Unlawful Acts of Police Officers.

November 29, 1905.

FRANK I. BENNETT, Chairman, Committee on Finance.

Dear Sir:

Replying to communication of the secretary of your committee of November 25 relative to claim of *Mary Rolston v. The City of Chicago* for the death of her husband which occurred on account of being shot by a policeman in the employ of the City of Chicago, I desire to say:

In the case of *The President and Board of Trustees of the Town of Odell v. Adolph Schroeder*, 58 Ill. 353, the Supreme Court uses the following language:

“It however remains to determine whether the town is liable for this imprisonment. The fact that the trustees adopted the ordinances and appointed the town constable to see they were executed did not render the town liable for the unauthorized, illegal and oppressive acts of that officer. They, as the representatives of the town, only empowered him to do what the ordinances required, and not to oppress citizens of the place. They did not direct the act to be done, either as a board or as individuals; they, we must suppose, had no idea the officer would do anything more than the law required. All officers are required to perform their duty, and the electing or appointing power expects them to do no more and, if they should, that power is not responsible for the wrong. This was the individual act of the officers.”

In the case of *Blake v. City of Pontiac*, 49 Ill. App. 543, the court, on page 551 of the opinion, uses the following language:

“It appears to be well established by law that a city, in the performance of its police regulations, cannot commit a wrong through its officers in such a way as to render it liable for his torts. Many cases go to this extent, and none that we are aware of hold differently.”

The *Schroeder* case in the 58th Ill., quoted above, is also cited in this case with approval.

Again in the case of *City of Chicago v. Williams*, 182 Ill. 135, the Supreme Court discusses at length the question of the liability of the City for the acts of the police officers, on pages 137, 138 and 139, uses the following language:

“Police officers are not agents or servants of the City, appointing them, within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the non-feasance or misfeasance of the officers of its police. There is an implied or common law liability for the negligence of municipal officers in the performance of corporate acts, which have relation to the management of the corporate or private concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation. But where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the pro-

motion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred.

"In *Town of Odell v. Schroeder*, 58 Ill. 353, where a party was charged before a justice of the peace with the violation of a town ordinance by committing an assault and battery, and was arrested therefor, and confined in the town prison, it was held that a municipal corporation is not liable for the illegal and unauthorized acts of its officers in administering an ordinance; and that, although trustees and other officers of the town may, by the illegal and unwarranted exercise of power, render themselves individually liable, the town is not thereby rendered liable.

"In *Wilcox v. City of Chicago*, 107 Ill. 334, where suit was brought to recover damages for an injury, sustained through the alleged neglect of a driver of a hook and ladder wagon, belonging to the city fire department, while such driver was engaged in the service of the city in saving property from destruction by fire, it was held that the members of the fire department, although appointed by the city corporation, are not servants and agents of the city for whose conduct the city is liable, but that they act rather as officers of the city charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, unless it is expressly given, and that the maxim *respondet superior* has no application to such a case.

"In *Culver v. City of Streator*, 130 Ill. 238, where a person had received a personal injury from one of the officers of an incorporated city, who, while enforcing an ordinance of the city which prohibited the running at large of unlicensed and unmuzzled dogs, attempted to kill a dog, and, through negligence, shot and wounded such person, it was held that the city's officers, appointed or employed by the city, are not its agents or servants, so as to render the city responsible for their unlawful or negligent acts in the discharge of their duties. In the latter case it was said, that the city is not liable for assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city, nor for illegal and oppressive acts of officers committed in the administration of an ordinance, nor for an arrest made by them which is illegal for want of a warrant.

“In *Craig v. City of Charleston*, 180 Ill. 154, where an officer had been appointed by the city to keep a street free from obstructions, and, while in charge of the street, had made an unjustifiable assault upon plaintiff resulting in serious injury to the latter, it was held that, in such a case, the city is not liable for injuries received; and we there said, that a ‘municipal corporation, while simply exercising its police powers, is not responsible for acts of its officers in violation of the laws of the State and in excess of the legal powers of the city.’ In the performance of its police regulations a city cannot commit a wrong through its officers in such a way as to render it liable for their torts; where the city is simply exercising its police powers, acts of its officers or agents, which are illegal and unlawful, are *ultra vires*; and a citizen has no remedy against the corporation for damages caused by such acts of its officers. (*Blake v. City of Pontiac*, 49 Ill. App. 543; *Arms v. City of Knoxville*, 32 *id.* 604.)”

In the case under consideration the person doing the injury was one Frank Austin, who was acting under an appointment by the police department of the City of Chicago as a police officer of said city, and while so acting he shot and killed Erasmus S. R. Rolsten, the husband of the woman who presents this claim.

In view of the decisions of the Supreme and Appellate Courts of this State above cited, I am of the opinion that the City is not liable to Mary Rolsten for any damages that might have resulted from the death of her husband, occasioned as aforesaid. I therefore recommend that the claim be not allowed.

All of which is respectfully submitted.

FRANK L. CHILDS,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Asst. Corporation Counsel.

**Appropriations May Be Made at Any Time During
Year From Funds Acquired From Bond
Issues for Corporate Purposes.**

November 29, 1905.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

November 27, 1905, the City Council passed the following ordinance:

“BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF
CHICAGO:

Section 1. That the sum of twenty-five thousand (\$25,000.00) dollars be and the same is hereby appropriated out of miscellaneous receipts not otherwise appropriated, to the credit of the Corporation Counsel's legal expense fund, No. 4d, and the comptroller* is hereby authorized and directed to pay bills vouchered against said fund.

Section 2. This ordinance shall take effect from and after its passage.”

Today this department received the following letter from you on the subject of “appropriation for expenses of Law Department”:

“The City Council made appropriation for \$25,000.00 out of miscellaneous receipts to pay the expenses of the Law Department in addition to the regular appropriation. The miscellaneous receipts of the year 1905 with the amount available from the levy of 1905 will not be sufficient to pay all of the expenses heretofore appropriated and authorized unless the proceeds of the \$2,000,000 worth of bonds be included in the item ‘miscellaneous receipts.’

“In view of this fact, will you please inform me if the appropriation referred to, having been made after the regular appropriation and against a fund not likely to be realized except by including the proceeds of the bonds, is legal?”

The question presented is whether the money as derived by the City from sources other than taxation can be directed

to be expended after the close of the first three months of the fiscal year which begins January 1st.

This question was passed upon by the Appellate Court in the case of *City of Chicago v. Berger*, 100 Ill. App. 158 Mr. Justice Adams, speaking through the court, said:

“It is urged that the order of November 14th is invalid because not passed within the first quarter of the fiscal year. This objection premises that the order is an appropriation order or ordinance which, in our opinion, it is not. The order is, we think, susceptible of the construction placed on it by the learned judge who tried the cause. He held that the words and the order ‘deposited in the City treasury to the account of track elevation’ indicated that the amount so deposited, namely, \$10,000.00, was deposited by the railway companies, and was not money raised by taxation and so expressed himself; and this was not denied by counsel for the City.”

The money raised by the issue of general corporate purposes bonds in the sum of \$2,000,000.00 is not “money raised by taxation” and may properly be considered as moneys derived from miscellaneous sources.

The contention that the appropriation bill of this year is greater in amount than the money derived from the levy of 1905 and miscellaneous receipts of 1905, and that therefore there is nothing left to be appropriated, is met by the answer that the proposed action of the Council is an amendment of the appropriation bill. If an appropriation of miscellaneous receipts can be made after April 1st, then any part of the appropriation bill dealing with the expenditure of miscellaneous receipts can be amended after that time.

July 7, 1902, this department rendered an opinion to the Chairman of the Finance Committee on the proposition of paying to the members of the Police and Fire Departments their full salary for the year 1902, and the question discussed in that opinion was whether this could be legally accomplished without violation of Section 2, Article 7, of the Cities & Villages Act, which provides for the passage within the first quarter of each fiscal year of the annual appropriation bill, in which the “* * * corporate authorities may appropriate

such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation. * * * No further appropriation shall be made at any time with such fiscal year," etc. The conclusion of such opinion was that the decision of Judge Tuley in the *Berger* case, approved by Judge Adams in the Appellate Court, justifies the view that at any time during the year an appropriation may be made for a corporate purpose from funds derived from miscellaneous sources (See page 326, *et seq.*, Opinions of the Corporation Counsel and Assistants).

Considering the proceeds of the corporate purposes bond issue as miscellaneous receipts, we are of the opinion that said appropriation was legally made, and can be paid from miscellaneous receipts including therein the proceeds of said corporate bond issue.

Very respectfully,

WM. H. SEXTON,

First Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Proposed Amendments to Ordinance Requiring Elevation of Tracks on Lake Street.

November 29, 1905.

WM. E. DEVER, Esq., Chairman, Committee on Track Elevation.

Dear Sir:

I acknowledge receipt of your letter of the 8th inst., asking the opinion of this department on, (1) the validity of the proposed amendment offered by the Chicago and Oak Park Elevated Railroad Company to Section 18 of the ordinance requiring the Chicago and Northwestern Railway Company and the Oak Park Elevated Railroad Company to elevate the plane of certain of their railway and railroad

tracks, now pending before the Council and published on page 3154 of the proceedings of March 20, 1905; and, (2) whether said company has the right under the terms of its original ordinance, passed May 15, 1893 (p. 901 of Special Ordinances) to remove, relocate or build new stations on their present right-of-way without the express authority of the Council.

The proposed amendment to said Section 18 is the addition of the following:

“That as the Chicago and Oak Park Elevated Railroad Company was delayed by legal proceedings, namely, a foreclosure suit, from completing its elevated railroad along the line as specified in the sixth clause of Section One of an ordinance passed May 15, 1893, as amended in ordinance passed November 27, 1893, concerning said companies, for a period of over ten (10) years, therefore the time for said company to build said line of railroad be, and the same is hereby extended to December 1, 1912.”

The sixth clause of Section 1 referred to is as follows:

“Sixth. Also, a branch commencing at some point on the main line of said road on Lake street, between Rockwell street on the east and California avenue on the west, and thence in a northerly direction to Diversey street, and thence, in a northwesterly direction, to the City limits.”

The said clause was amended on November 27, 1893 (p. 911, Special Ordinances) by striking out said clause and inserting in lieu thereof the following:

“Sixth. Also, a branch commencing at some point on the main line of said road on Lake street between Western avenue on the east and California avenue on the west and thence, in a northerly direction, to some point or place between Chicago avenue on the south and Potomac avenue on the north, and thence, in a westerly direction, to some point or place between Rockwell street on the east and California avenue on the west, and thence, from said last named point, in a northerly direction to some point or place one thousand (1,000) feet north or south of Diversey street, and thence, from said last named point, in a northwesterly direction to the City limits.”

The information you now desire on this point is whether the company has the right to any extension of time to build this branch, and, if so, the length of time; also whether Section 13 of the original ordinance bars its right to such extension.

Section 10 of the ordinance provides for the time within which the branch road shall be completed; but the claim is made that its provisions are ambiguous in that by a general clause it is provided that all branches of the road, other than the first one authorized to the north, shall be constructed within five years from the acceptance of the ordinance, while the particular provisions afford less time. The material portion of the section reads as follows:

“The privileges and authority hereby granted are so granted upon the further express condition that the first branch line hereby authorized to the north shall be laid down and constructed within three years from the acceptance of this ordinance by said company, and the remainder of said railroad and branches within five years from the acceptance of this ordinance, and, if the said first branch be not so constructed within the said three years, then said rights and privileges granted to said company to build said northerly branch shall cease and be null and void; and, if said southerly branch be not built within said five years, then the right to build the same shall cease and be null and void; and, if said branch between Rockwell street and California avenue shall not be built within three years from the passage hereof, the right to build the same shall cease and become null and void. * * *”

Even though the general provision reading “the remainder of said railroad and branches within five years from the acceptance of this ordinance” is in conflict with the special provision reading “if said branch between Rockwell street and California avenue shall not be built within three years from the passage hereof,” the particular provision must prevail and be treated as an exception to the general provision; in other words, the general enactment must be taken to affect only such provisions within its general language as are not within the provisions of the particular enactment.

As thus construed the company had but three years from the passage of the ordinance to build the branch in question—that is, to May 15, 1896, unless it be shown that the facts bring it within the contingency set forth in Section 10, which is as follows:

“but, the time during which any legal proceedings shall be pending, whereby the said company shall be prevented or delayed in constructing its railroad or branches, or any part of said railroad or branches, shall be excluded from the time herein prescribed for the completion of said elevated railroad and branches, and shall be allowed the said company in addition to the time above prescribed for the completion thereof. The City of Chicago, however, shall have, and it hereby expressly reserves, the right to intervene in any suit or proceeding brought by any person or persons seeking to enjoin, restrain, or in any manner interfere with the prosecution of said work of construction, and move for a dissolution of such injunction or restraining order and for any other proper order in such suit, in case it shall deem such suit collusive or for the purpose of delay, or to extend the time herein prescribed for the completion of the said elevated railroad.”

In a communication addressed to Assistant Corporation Counsel Beckwith, under date of November 16th, which is attached hereto, general counsel Knight of the company refers to numerous suits begun against it, the last one of which he says was disposed of on April 1, 1905, and urges that there should be added to the time allowed by the ordinance for the completion of this branch, the time taken up in such litigation. Most of these suits were begun in the years 1893, 1894 and 1895 and were determined shortly thereafter; and Mr. Knight now informs me that there was practically but one piece of litigation upon which he relies to sustain his claim for an extension of time; namely, the Ziegler litigation, to which he refers in his letter in part as follows:

“In addition to this multitude of litigation, there was a suit brought by William Ziegler of New York on April 8, 1895, in the U. S. Circuit Court, as a stockholder, for a receiver for said company. This suit was

bitterly contested and disposed of finally by the Circuit Court of Appeals on October 5, 1896, Gen. No. 23705. This case will be found reported in the Federal Reporter.

"At the instigation of the same Ziegler, the Farmers Loan & Trust Company, trustee under the Lake street mortgage, on January 30, 1896, brought suit to foreclose the mortgage by a bill in the U. S. Circuit Court for the Northern District of Illinois, Gen. No. 23995. A bitter contest arose over this litigation and it was not finally disposed of until April 1, 1905. In the interim it went to the Circuit Court of Appeals twice and was attempted to be taken to the U. S. Supreme Court by certiorari three times. There was a branch of this litigation concerning the same foreclosure heard in the Superior Court of Cook County, Illinois, from there to the Supreme Court of Illinois, from there to the Supreme Court of the United States, thence back to the Supreme Court of Illinois, then before the U. S. Circuit Court of second appeal, and was finally determined by the U. S. Circuit Court of Appeals that the U. S. Circuit Court never had jurisdiction over the original case.

* * *

On the company's showing it will be seen that this litigation originated in April, 1895; and it will be seen by the provisions of the ordinance this branch of the road was required to be finished by May 15, 1896, unless prevented or delayed by the above litigation.

Section 13 referred to by you is as follows:

"The permission and authority hereby given and granted are so given and granted upon the further express condition that said company shall proceed within ninety days from the date of the acceptance of said ordinance to procure land for right of way, as herein authorized, by condemnation or otherwise, and shall prosecute such acquisition of said right of way with due diligence thereafter until the whole right of way is obtained."

Mr. Knight informs me that the company did, within the time specified, procure all the land referred to and that the delay in building the road is not due to their inability

to get the land, but is due to their inability to erect the structure and furnish the equipment.

In view of the facts, I am of the opinion, that the delay, if any, chargeable to the litigation in question, is not sufficient in law to excuse the company, and that the grant from the Council has, by its terms, ceased and become null and void.

I should also, perhaps, answer the verbal claim of Mr. Knight in this connection, that Clause 6 of Section 1, as amended, is not subject to the limitation provisions of Section 10; that is, the original clause refers to a line between Rockwell street and California avenue, while the amended clause refers to a line between Western avenue and California avenue, and that therefore the provisions of Section 10 do not apply. This position is not tenable in my opinion. The amendatory ordinance relates exclusively to the original ordinance, and by all reasonable rules of construction, in view of the context, it must be considered a part of that ordinance. There would be some merit in the claim if the Council had passed a general ordinance containing the provisions of this amendatory ordinance, but without therein amending any particular clause, section or ordinance.

Answering your inquiry as to whether the company has the right, under the terms of the original ordinance, to remove, relocate or build new stations on the present right of way without the express authority of the Council, I beg to say that this department has rendered opinions on this subject in similar cases, and has held that where the company has once completed the construction of the railway described in the ordinance, and such ordinance does not provide for future alterations or additions to the structure, the authority granted is exhausted. Additions and alterations cannot, therefore, be made without a new ordinance. (Opinions of the Corporation Counsel and Assistants, pp. 488 and 492.)

In view of my opinion on the foregoing points of your inquiry I assume that it is not necessary to touch upon the

question of the Chicago and Northwestern Railway Company's proposed amendment regarding the 20 feet clearance.

Yours very truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

Erection of Two Tenement Houses on One Lot.

December 7, 1905.

HON. P. J. O'CONNELL, Chairman, Sub-committee of Committee of the City Council on Building Department.

Dear Sir:

You recently made a verbal request for an opinion from this department as to the right of an owner of a lot bounded by streets on two of its sides, and by an alley on a third side, to erect two new tenement houses on such lot; one of which should face on one of the streets with one side of the building abutting on the other street, and the other of the buildings facing on the other street with one of its sides abutting on the alley, provided that there was a yard in the rear of the first building between that building and the second building of, at least, 10 feet in width.

Your committee has called my attention to Section 633 of the Building Ordinances (Section 410, Revised Municipal Code), which reads as follows:

“At the rear of any lot containing a new tenement house (unless the rear of such lot abuts upon a public alley, at least, 10 feet wide) there shall be a yard open and unobstructed from the earth to the sky * * * such yard shall on corner lots (as above defined) have an area of, at least, 8 per centum of the superficial area of the lot, and shall on other lots have an area of, at least, 10 per centum of the superficial area of the lot,” etc.

I do not think that the foregoing section is intended to forbid the construction of such buildings, as the owner in the specific case you have put, desires to erect. The word "lot" is a word of rather indefinite meaning, and so far as I am aware has no particular legal significance. In erecting the first of his two buildings the owner of the property in question must, I think, leave in the rear such a yard as is provided for by the Building ordinances. In erecting the second of his buildings; that is, the one which fronts on the side street, I think a yard must also be provided as provided in the Building ordinances. I think, in short, that the owner of the property may, for the purpose of erecting buildings, divide his property into two or more lots, but he cannot in building his second building in the rear of his lot, treat the alley as being in the rear of his building, when, as a matter of fact, the alley is actually to one side of the building, because of the manner in which it faces. The section in question makes the size of the yard in the rear of a tenement house depend upon whether or not the lot upon which the building is erected is a corner lot. A corner lot is defined by Section 630 of the building ordinances (Section 407, Revised Municipal Code) as follows:

"By 'corner lot' is meant a lot situated at the junction of two streets, or of a street and a public alley not less than sixteen feet in width. Any portion of the width of such lot *distant more than fifty feet from such junction* shall not be regarded as part of a corner lot, but shall be subject to the provisions of this chapter respecting other than corner lots," etc.

I am confirmed in my opinion that the building ordinances did not intend to prohibit the erection or continuance of more than one building upon a single lot (the word lot here being used as meaning a lot appearing upon a plat of any particular subdivision).

By the language of Section 629 of the building ordinances (Section 406, Revised Municipal Code) which in part is as follows:

"No new tenement house *alone* or with other buildings now or *hereafter erected*, shall occupy above the

first story more than 85 per centum of the area of a corner lot, or more than 90 per centum of the area of such corner lot if such corner lot is bounded on three sides by streets or alleys. * * * At the time of applying for the erection of a new tenement house the applicant shall submit a plat of the lot, showing the dimensions of the same, and the position to be occupied by the proposed building, and the position of any other building or buildings that may be on the lot, etc."

My conclusion is, then, that in the building case which you have referred to this department for an opinion, the owner of the improved property may erect two tenement houses thereon, if he comply with the provisions of the building ordinances in reference to yards.

Yours truly,
MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Application of Commonwealth Electric Co. for Permits to Erect Poles.

December 8, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

I transmit herewith two applications from the Commonwealth Electric Company for permits to set poles and string wires, dated December 7, 1905, and numbering respectively 2252 and 2253. I retain the duplicates in this office.

I find the following legal objections to the issuing of a permit in compliance with application No. 2252. The first, second and fourth paragraphs of the application request permission to erect poles or string wires within the so-called "underground district," which is prohibited by Section 2 of the ordinance of January 28, 1897, granting rights to the

Commonwealth Electric Company (Special Ordinances of Chicago, 1898, Vol. 2, page 1905).

The first, ninth and tenth paragraphs of application No. 2253 are subject to the same objection. My chief reason, however, for calling these permits to your particular attention is found in the last paragraph of application No. 2253; which reads as follows:

“This application by virtue of ordinance granted the Peoples Light and Power Company by the President and Board of Trustees of the Village of Hyde Park on the 23d day of October, 1888, and by the Peoples Light and Power Company assigned to the Calumet Gas Company, and by this last mentioned company to the Commonwealth Electric Company.”

All applications to the City of Chicago for permits for construction, repair or extension work should be made and purport to be made under and in compliance with the terms of the above mentioned ordinance of June 28, 1897. In an opinion addressed to L. E. Gosselin, Deputy Comptroller, dated September 30, 1903 (see, Opinions of Corporation Counsel, etc., p. 479), this department gave an opinion to the effect that general and special ordinances of the City of Chicago applied not only to the limits of the City as existing on the date of the passage of any ordinance, but also to the limits of the City as they may exist from time to time thereafter. In short, all territory upon its annexation to the City becomes subject to the City ordinances. Practically every point in the opinion mentioned was decided in the same manner in a case decided subsequently by the Supreme Court of Indiana (*Railroad Company v. Hoffman*, 161 Ind.). The law on this question is too clear for any argument, and I think the principle applies to the present case.

While on the subject of permits of the Commonwealth Company, I would call your attention to the printed form used by the company at the end of its applications, which reads as follows:

“As required by an ordinance passed by the City Council March 28, 1898 (Council Proceedings of 1897-1898, page 2099), this company will allow the City of

Chicago to use said poles and to attach thereto cross-arms, wires or other electrical appliances for the distribution of electric current to be generated by the City for the electrical service of the City; *provided*, however, that the necessary use of such poles by this company for its business shall not be interfered with for such electric service of the City *and that the electric service of the City shall not be understood to include the supplying of electrical energy by the City directly or indirectly to any other consumer or consumers than the City itself*, and that the City shall not be entitled by virtue of anything in said ordinance or in this application contained to use said poles or any of them for supplying or distributing electrical energy to other consumers than the City itself," etc.

Section 3 of the ordinance of June 28, 1897, provides that the company may erect a system of poles and wires in the streets and alleys of Chicago, etc., "provided that the City of Chicago shall have a right to the top cross-arm of each of said poles free from charge, for the use of the City telegraph and telephone wires." The clause of the ordinance last quoted is a general provision and furnishes no basis for the interpretation which the company seeks to put upon it by the clause from its permit last quoted. I see no reason why the company or any other public service corporation may not in making an application for a permit use any reasonable expression for the purpose of showing that it does not intend to prejudice its rights by making an application under a particular ordinance, but that does not justify the company in attempting to incorporate into the ordinance which it has accepted and which is a contract, new terms or conditions. The City of Chicago is entitled to use the top cross-arm of each pole of the Commonwealth Electric Company for the use of all "City telegraph and telephone wires." Section 4 of the ordinance we have been referring to prohibits the company from erecting poles or stringing wires "until it shall have procured a permit from the Department of Public Works of said City for said work." You are therefore authorized, under the provisions of Section 4 just quoted and the other provisions of that section, to prevent this con-

struction work until the company shall have applied for and obtained permits pursuant to the ordinance.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

What Constitutes a Detective Agency.

December 8, 1905.

JOHN E. TRAEGER, ESQ., City Collector.

Dear Sir:

Your letter of recent date to which was attached a letter from The Burr-Herr Company, and in which you inquire whether this company is a detective agency within the meaning of the ordinance licensing same, was referred to me for an opinion.

Whether or not this company shall be classed as a detective agency depends altogether on the definition of the word "detective," since its business is of a peculiar kind and relates entirely to railroad work.

In the communication referred to above, the manager for this company states, among other things, that the company gives figures and reorganizes railway police. On inquiry, he stated to me that this meant that they did this work for the railroad company itself, and did not furnish any police to the railroad company; also that the investigation and settlement of personal injury cases, which this company does, is not in the nature of detective work, and the information obtained is not ordinarily regarded as secret.

As to the other things which this company does, according to the statement contained in their letter, I do not think they come under the head of detective work. Webster's International Dictionary defines a detective as "One whose

business it is to detect criminals or discover matters of secrecy." The Century Dictionary's definition of a private detective, which is adopted by the Cyclopedia of Law and Procedure, is as follows: "A private detective is a person engaged unofficially in obtaining secret information for or guarding the private interests of those who employ him."

In *Byrnes v. Matthews*, 12 N. Y. St. 81, the court defined a detective as follows: "The literal thing understood by the word 'detective' in common affairs is a person who is able and has the facilities to detect criminals with a skill not possessed by other professionals."

In *State v. Bennett*, 102 Mo. 356, where the defendant was prosecuted for pursuing the business of a private detective without a license, it was shown that he kept a business office, the sign of which read "C. D. Bennett, Detective Agency"; that he advertised as a detective and was employed so. The court held that these facts fairly tended to support the charge preferred.

In the present instance, the sign on the door states that they are "Investigators"; they also appear as such in the body of the City Directory, although in the classified portion of that book they appear under the head of "Detective Agencies."

While I am inclined to the view that where a person makes investigations for the purpose of using same against a party who seeks to conceal the information, is a detective, even though he devotes himself to some special class of business, still I would not regard the business done by this company, if it is as stated in their letter, as a detective business.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Drip Pans at Street Crossings.

December 8, 1905.

MR. JOSEPH M. PATTERSON, Commissioner of Public Works.
Dear Sir:

I am in receipt of your favor of the 8th inst. addressed to the Corporation Counsel, together with a letter of Alderman Otto Reese, dated the 28th ult., which I return herewith. Alderman Reese inquires whether you cannot compel the Northwestern Elevated Railroad Company to construct "drip pans," so-called, at all street crossings, sidewalks, avenues and alleys.

Section 7 of the City ordinance passed January 8, 1894, and accepted January 15, 1894, by the Northwestern Elevated Railroad Company (Special Ordinances of Chicago, 1898, Vol. II, page 933), contains the following provision:

"Suitable and practical devices shall be permanently placed and maintained beneath all station buildings and platforms when the same are erected over any street, avenue or alley and, also, at all street crossings, arranged to intercept and promptly carry off storm water and drippings from melting snow, or from any other causes whatever; and, similar devices shall also be applied to motive power and rolling stock to intercept and hold all cinders, ashes, oil or anything else that may drop from moving trains to the surface of the street beneath the structure."

Section 16 of the same ordinance provides (among other things) that:

"The space and the surface of the ground under said railroad, beneath girders and between columns, so far as the same is not occupied by said railroad company, shall by said company be kept at all times free from all obstructions and in a clean and wholesome condition, to the approval and satisfaction of the Department of Health or health officers of said City."

In my opinion the above provisions of the company's ordinance are valid and should be complied with. The only

possible objection I can see to their validity, is that these provisions contain a delegation of legislative power to the Commissioner of Public Works. I do not think this objection is tenable and, further, the company, by its acceptance of the ordinance, is probably estopped to raise it. The ordinance contains no general penalty clause, and the remedy of the City, therefore, for violation of these provisions is either by mandamus proceedings or an equitable action.

I would suggest that before any legal proceedings be taken you make a specific demand upon the company to comply with the ordinance and learn, if possible, what their intentions are in that regard.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Power to Require a Railroad Company to Elevate or Depress Tracks and Pay the Cost.

December 9, 1905.

HON. JOS. M. PATTERSON, Commissioner of Public Works.

Dear Sir:

We have your letter submitting a communication from the City Bridge Engineer relating to the construction of a new bridge at Dearborn street, in which this department is asked to look into the matter with the view of ascertaining what proportion of the cost of the construction of the new viaduct over the C. & N. W. tracks should be borne by that company and the North Chicago Street R. R. Company.

We do not know the terms of the agreement entered into between these companies and the City under the Council order of April 30, 1888.

It is not within the power of the City to divest itself of its control of its streets, and all agreements tending to that end are void. Whenever, in the judgment of the City, it is necessary to make a change in the streets so that they may be traveled in safety, the City can compel a railroad company to depress or elevate its tracks or construct a viaduct over them, and the expense can be imposed on the company.

If, in the judgment of the City, it is necessary that a new, or a wider viaduct be constructed as an approach to the new Dearborn street bridge, the cost thereof can be placed upon the railroad company whose tracks make the street unsafe, or upon the street railway company benefited by the change. All grants or agreements with these companies were and are subject to, and they must yield to the City's duty to adjust the grade of its streets so as to best promote the general public welfare.

Herewith we return the Bridge Engineer's letters together with the blue print.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

When City Fails to Accept a Platted Alley, it Cannot Oppose a Vacation of the Same.

December 9, 1905.

HON. B. W. SNOW, Chairman, Committee on Compensation.

Dear Sir:

We acknowledge receipt of your letter transmitting the ordinance vacating the alley abutting upon Lots One (1) to Six (6), inclusive, in the Subdivision of Lot Eight (8), Block Forty-one (41), Original Town of Chicago, in which you say that a claim is made that this is a private alley, and that the City has no right to demand compensation for its vacation.

Upon making an investigation we are unable to find any evidence that the City has ever accepted this alley or exercised any authority over it. We are advised by the Street Department that that department has never had anything to do with the alley, and by the Sewer and Water Pipe Extension Department that there is no sewer or water pipe in the alley.

In the case of *Chicago v. Borden*, 190 Ill. 430, 442, where the City claimed that a certain strip of land had become a public alley, the court said:

“In order to constitute a dedication at common law, it is essential, (1) that an intention on the part of the proprietor of the land to donate the same to public use; and (2) an acceptance thereof by the public to be established by the evidence, and (3) that the proof as to these facts must be clear, satisfactory and unequivocal.”

In *Hamilton v. C. B. & Q. R. R. Co.*, 124 Ill. 235, 242, the question was whether or not certain streets were accepted and in determining this it was necessary to learn whether the plat had been accepted, and the court said:

“It is well settled, that at common law, to make a complete dedication there must be acceptance, * * * not any formal act of acceptance, but that there must be user, or some other act indicating acceptance by the public authorities, in order to complete the dedication. * * * And this principle applies to statutory dedications by the making, acknowledging and recording of a town plat as well as to common law dedications, as has been expressly decided by this court. Until the municipality accepts it can not be bound, by mandamus or otherwise to open or improve the streets, and until then it necessarily can have no rights in the streets, as trustee or otherwise.”

While it is true that the owner did make a plat offering this land to the City as an alley, it seems very clear in this case, from the facts as we have been able to learn them and have stated them, that the alley has not been accepted by the City. This being the case, the City has no interest in the alley, and it is within the power of those owning abutting property to vacate the same.

We herewith return the ordinance accompanying your letter.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:
JAMES HAMILTON LEWIS,
Corporation Counsel.

Construction of the Term "Legal Voters" in Ordinance Requiring Signatures to Dramshop Petition.

December 11, 1905.

JOHN M. COLLINS, Superintendent of Police.

Dear Sir:

I have your communication in which you request an opinion as to whether, under the local option ordinance of the Town of Cicero, a petition for a license to keep a dramshop must be signed exclusively by registered voters.

Section 1 of the Revised Ordinance of the Town of Cicero is as follows:

"No application for a license to sell or give away fermented, malt, vinous or intoxicating liquors shall be granted unless the same shall be accompanied with a petition praying that a license to sell liquors be issued to the applicant, and stating the exact locality where the applicant proposes to sell liquor, and signed by a majority of the legal voters residing within one-half mile of the proposed place where liquors are to be sold."

Briefly, the question involved in your request is this: Must a person be a registered voter in order to be a legal voter? Section 1 of Chapter 7 of the Constitution of the State of Illinois of 1870 defines a person who is entitled to vote as follows:

"Every person having resided in this state one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was

an elector in this state on the first day of April in the year of Our Lord 1848, or obtained a certificate of naturalization before any court of record in this state prior to the first day of January in the year of Our Lord 1870, or who shall be a male citizen of the United States above the age of twenty-one years, shall be entitled to vote at such election."

On the point in question there is a conflict of authorities without the State of Illinois, but in this state we think the lines are clearly drawn. Article 7 of the Constitution, as above set forth, describes the qualifications, the possession of which entitles a person to vote. It will be seen registration is not one of them. Any subsequent enactment by the State Legislature making registration a condition which must be performed before a person shall be permitted to vote must be held to be a regulation of, and not a legal qualification for, the exercise of the right of suffrage, because the legislature has not the power to make additional the qualifications of a voter unless the power be expressly conferred by the Constitution of the State.

Registration does not qualify a voter for voting; it simply determines who *are* qualified. The purpose for which the registry is kept is to establish and maintain a correct record of qualified voters, and to prohibit the exercise of the privilege of voting by those who are *not* qualified to vote. The registry is a safeguard to preserve the ballot box from fraud, and is not designed to abridge the elective franchise.

It was well said in *People v. Hoffman*, 116 Ill. 611:

"By prescribing certain qualifications for voters, the constitution necessarily intended that the legislature should provide some mode of ascertaining and determining the existence of these qualifications. A registry law is merely a mode of ascertaining and determining whether or not a man possesses the necessary qualifications of a voter."

Now, what was intended in the limitations prescribed by the Cicero ordinance? We think it manifest the intention of the legislators who framed the ordinance was to give to the property owners and residents of the aforesaid local

option district the right to determine whether the establishment of a saloon in their midst would be detrimental to their property interests or to their peace and comfort; in other words, whether it would be a nuisance. If that was the intent, would it not be an unjust discrimination to hold that a citizen, possessing all of the qualifications of a legal voter, who owns valuable property in the immediate vicinity of the proposed location of the dramshop, shall be deprived of the right of protest or of the right to assent under the ordinance merely because he is not a *registered* voter? We think it would. The property or comfort of a citizen is as distinctly subject to injury whether or not his name is contained on the list of registered voters.

In *People v. Harrison*, 191 Ill., page 257, and in *Harrison v. The People*, 195 Ill., page 471, the following language was used:

“In construing ordinances, no less than statutes, all general provisions, terms, phrases and expressions should be liberally construed, in order that their true intent and meaning may be fully carried out. * * * The persons who will be injuriously affected by a dramshop are not those, alone, who own property or reside or are engaged in business upon the street upon which it has its main entrance, but it directly affects the character and the value of all the property in the block where it is located.”

And so do we believe that this ordinance was designed for the benefit of every citizen in that local option district, even though his name might not appear upon the registry of voters.

From the foregoing you will observe that it is the law in the State of Illinois that it is sufficient that a voter shall be a legal voter, to wit: over 21 years of age, citizen of the United States and the State of Illinois, and a resident within the County of Cook and City of Chicago for the specified time, and this, too, irrespective of whether he has registered (which is a mere announcement of his being a legal voter) or not. Therefore, the question is: How shall a petition be verified?

After the petition is signed, and a sufficient number of names rightfully appear under the statement of being legal voters, etc., the presumption is that such voters are legal and the number sufficient. You may adopt a method to verify the same from your police officers. This verification can take either course, to wit: personal investigation or inquiry of others who may know the existence of the signers.

Should there be those who wish to assail the petition upon the ground that the same is a fraud in respect to any of the signers, such should make the investigation or direct your department to the evidence, or produce the evidence to you, and that, too, in sufficient number as would render the petition valueless in showing that the remaining number of signers upon the petition in excess of those who were illegal voters, or not voters at all, was not sufficient to be a majority within the particular district.

Should it develop that some of the signers of the petition had moved away from the district before verification, this would not render this signature illegal nor the petition invalid; nor would it be incumbent upon the Police Department in any respect to pursue these people to ascertain their whereabouts merely because it appeared that they had removed. To the contrary, the Police Department can verify the petition by ascertaining that the persons when they did sign were really legal voters of the district at the time they signed. If there be those who contend that these persons have moved away, these persons who so contend must take the burden of proving such and disclosing, by sufficient evidence, to your department such fact. Then it would be necessary to prove that when they did sign they were not legal voters. It would be further necessary to prove that, assuming they were not legal voters when they signed, there had been sufficient number who were illegal to render the petition void.

It is not for the Police Department to convert itself into a detective agency merely to ascertain what has become of people who might have signed petitions; and the moving away is not any evidence that they were not legal voters at the time of the signature; nor can the Police Department pre-

sume that because they have moved away they were not present at all. If charges of this sort should be made, those making the charges have a right to prove such fact to your department and should produce the evidence. Without the production of such evidence the license could not be revoked and the City thus retain the money of the applicant, as such would be an apparent fraud, so long as the laws of our State and City recognize the saloon as a business and exact revenue for the conduct of the same.

I assume that this reply answers your communication in full.

I have the honor to be,

Very respectfully,

JAMES HAMILTON LEWIS,

Corporation Counsel

Relations of the City With the Chicago Subway Co. and the Illinois Tunnel Co.

December 14, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.
Dear Mr. Patterson:

I beg to bring to your attention that I am reliably informed—and from a source which is worthy of hearing—that the Chicago Subway Company, which is the holding company of the Illinois Tunnel Company, has for some time past been and is now making contracts for the general supply of telephone service, freight and transportation service through the tunnel to different persons and business houses, and thus in the name of the Subway Company obtaining contracts for a long term of years, thus creating a monopoly of all the contract privileges and revenue which might come from the same through the patrons of such service as might be afforded to the tunnel.

I beg to invite your attention that if this continues, all possible sources of patronage of any matter having to do with

the tunnel will be wholly monopolized in the hands of the Subway Company, and the City be wholly prohibited because of these conditions from either possessing opportunities to serve customers or having customers to serve.

I beg also to invite your attention that the legal situation will be that, as against any attempt of the City to take possession of the tunnel, the Subway Company will contend that all contracts theretofore made and existing are in the hands of the Subway Company and in the name of the Subway Company, and thus will claim the contracts as an asset and insist that the City shall recognize the title of the Subway Company in the contracts, upon the theory that the City's silence and want of protest was an acquiescence upon the part of the City of the Subway Company obtaining the contracts in its own name and proceeding under the same to obtain its revenue. Also, it will be contended by the Subway Company that, even if the City should take possession of the tunnel, it could not avail itself of the wires and other conveniences of the tunnel without condemnation and payment for the value of the property, and with this will insist upon the value of their contract as equivalent to the value of the franchise. I regret to say that the ordinance is so drawn as to permit this contention to have a *prima facie* value. I therefore beg to recommend for your honorable consideration that your department take such steps as is appropriate under your practice and according to your judgment to provide that in the future, and if possible as relating to matters of the past, the contracts with the Subway Company shall include the City of Chicago as a party, thus forcing a recognition by the Subway Company of the City of Chicago as the ultimate owner of the company and as at present entitled to be treated as one of the proprietors of the same.

This should be done notwithstanding that provisions respecting the revenue under the contracts might not provide any immediate return to the City, but recognize wholly the right of the Subway Company to the same. However, this course as here suggested would prevent in the future the Subway Company, as a foreign corporation under the laws

of New Jersey, from contending that as it was not a party to the franchise and was permitted these contracts through the silence and acquiescence of the City, as a foreign corporation it holds its rights upon the theory of being an innocent holder of the property which could not be taken from it by a claimant who has rested quiet for years, except in violation of the Federal Constitution, to wit, of taking property without just compensation, etc.

I beg to recommend to your Honorable office that such notice go out from your office as will indicate in the future, from the records of the City, that no such acquiescence on the part of the City is being consciously indulged, respecting matters of the past, and as will serve as a protest respecting matters for the future.

I have the honor to be,

Respectfully,

JAMES HAMILTON LEWIS,

Corporation Counsel.

**Office of Attorney for Civil Service Commission is
Under Direction of, and Appointed by,
the Corporation Counsel.**

December 21, 1905.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

There has been transmitted to me your verbal request for an opinion from this department as to the status of the office, or place of employment, commonly known as the Attorney for the Civil Service Commission, and more particularly as to whether that office or place of employment is under the jurisdiction of, and its incumbent subject to, appointment by, the Corporation Counsel.

The department of Corporation Counsel for the City of Chicago is established by Section 73, Article I, Ch. 5 of the

Revised Municipal Code of Chicago of 1905. Section 76 provides that:

“The Corporation Counsel shall have the power of appointing and removing all or any of its assistants and clerks.”

Section 77 provides that:

“He shall superintend and, with the assistance of the City Attorney and Prosecuting Attorney, conduct all the law business of the City.”

The Civil Service Act, passed by the legislature of this State on March 20, 1895, and subsequently adopted by this municipality, provides by Section 3 that:

“Said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the Commission shall constitute the classified Civil Service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned.”

It is plain that the intention of the act was to place under civil service all the offices and places of employment in the City of Chicago, with the exception of the offices and places of employment included in Section 11 of the act. Section 11 excepts from the operation of civil service certain officers, and provides as follows:

“Officers who are elected by the people, or who are elected by the City Council pursuant to the City Charter, or whose appointment is subject to confirmation by the City Council, Judges and Clerks of Election, members of any Board of Education, the Superintendent and Teachers of Schools, heads of any principal department of the city, members of the law department, and one Private Secretary to the Mayor, shall not be included in such classified service.”

The position of Attorney for the Civil Service Board was filled by appointment by the former Mayor, and the salary for the position has been included in the annual appropriation made for the civil service department.

The incumbent while performing the duties of his position has been stationed in the office of the Civil Service Commission, in order more properly and conveniently to attend to the routine duties of his position and to enable him to be in close touch with the members of the Commission and others having need of his legal advice upon matters arising under the operation of the Civil Service Act and the rules of the Commission.

A general supervision of his place of employment has, however, been always claimed and exercised by the Corporation Counsel, and he has been considered one of the employes and assistants of the Corporation Counsel. This course has been followed, as it is the only one which could have been legally adopted. The position in question can have no legal existence unless ancillary to the legal department it not being under civil service and the incumbent never having been certified by the Commission after an examination passed and appointed upon such certification by the Commission. The sole legal status of the office or place of employment depends upon its being included under those officers mentioned in Section 11 as "members of the law department," and this position has always been treated as such.

The courts since the adoption of the Civil Service Act have regarded with jealous attention any attempt on the part of the municipality to exempt any office or place of employment, or the incumbent thereof, from the operation of the Civil Service Act, and have expressly held in the case of *People v. Kipley*, 171 Ill., page 90, that the City is without power to cause to be filled any office or place of employment in the City's service (with the exception of those mentioned in Section 11), except in accordance with the provisions of the act; namely, after an examination and appointment in accordance with the Civil Service Act and rules.

The comptroller, paymaster, treasurer and other officers and agents of the City are expressly prohibited from paying, or be in any manner concerned in paying, any salary or wages to any officer or employe of the City, unless such person is occupying an office or place of employment according to the provisions of law.

Any incumbent of the position of attorney for the Civil Service Commission who is not in fact a member of the law department could not be occupying his position in accordance with the law. It follows that any incumbent of the position in question, being a member of the law department, is under the direction of the Corporation Counsel, and his appointment is to be made by that officer, and is not an appointment with which the City Council had any voice, either in the matter of confirmation or disapproval.

Yours respectfully,

JAMES HAMILTON LEWIS,
Corporation Counsel.

Opinion in re Grouping of Water Meters Under the Ordinance.

December 23, 1905.

H. O. NOURSE, Esq., Superintendent of Water.

Dear Sir:

I have been instructed to give you an opinion as to the proper interpretation of Section 2422 of the new Municipal Code as affecting several plants belonging to one concern located in different parts of the City. Said section reads as follows:

“Where the water supply to any one business enterprise or to any building, structure, or premises used or operated by one person or corporation or by a single business enterprise is controlled by two or more water meters, the aggregate readings of such meters shall be taken and the charge made for water supplied through same shall be at the same rate as if such water supply had been supplied through one meter.”

The question hinges principally on the definition of the words “one business enterprise” and arises in cases where the same concern operates several plants at a distance from each other, or a main plant with branches at different places in the City. It seems as though this matter has been under

discussion for a long time. The difficulty first arose under the old ordinance, owing to the railroad companies claiming that their various depots and shops were "continuous premises" on account of connecting tracks and right of way. This was conceded. Thereupon the Congress Hotel Co., which owns the Auditorium and the Annex, and The Crane Co., which has several large factories at some distance from each other, claimed the same rights as the railroads. The Crane Co. case was referred to this department for an opinion, with the effect that one of the assistants, in an opinion approved by the Corporation Counsel, declared that the ordinance did not contemplate the grouping of the meter readings. This interpretation was objected to so strongly that the ordinance was changed at the suggestion of the Superintendent of the Water Bureau. The change was intended to cover the precise point at issue. The amended section was intended to give such concerns as the Congress Hotel Co., The Crane Co., and H. H. Kohlsaat Co. the benefit of the low rate by grouping their meters.

In construing statutes and ordinances, the primary object to be attained is to ascertain the intention of the law-making body. While this intention should always be found in the language of the law itself, yet when the language is doubtful the intent may be ascertained by all legitimate methods of interpretation. One of the cardinal rules of interpretation is that a statute or ordinance must be construed with reference to the object intended to be accomplished by it. The authorities all agree that the circumstances attending the enactment and the purposes of same may be considered, so that the law will answer the intention of the makers as collected from the cause or necessity for enacting it. Where it is possible to ascertain what mischiefs were to be suppressed or benefits were to be attained by it, a court in construing it will not suffer the object to be defeated.

I am, therefore, convinced from the circumstances attending the enactment of the new section that it must be interpreted so that the concerns mentioned above and others of a like nature shall be entitled to the benefit of the low rate

resulting from grouping their meters. It must, however, be borne in mind that in no case can the meter reading in any of the independent premises of such a concern be taken in case such reading would amount to less than the frontage rates as applied to such independent premises. In other words, where the reading is less than the frontage rates the frontage rates must be adopted in place of the meter reading in computing the amount that is due from such concern.

I come to the conclusions above by following a line of authorities which lay down the doctrine that when there is any doubt as to the language of a law it must be construed so as to carry out the intent. This doctrine is supported by abundant authorities, among which are the following Illinois cases:

Perry County v. Jefferson County, 94 Ill. 214.

Wabash, etc., Railway Co. v. Bingert, 106 Ill. 298.

Very truly yours,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Whether the Lowering of a Sewer Shall be Done by Special Assessment or General Taxation.

December 26, 1905.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

We return herewith a communication to you from the president of the Board of Local Improvements relative to lowering of the old sewer in Carpenter and May streets, between 69th and 70th streets, preparatory to paving, with the letters attached thereto.

Mr. Schilling expresses the opinion that this work must be paid for out of the general fund, and that it cannot be

done by special assessment. In my judgment the president is wrong in his conclusion.

By Paragraph 13 of Section 1, Article 5, of the City & Village Act, the City Council is given power to regulate the opening of streets for "building and repairing of sewers, tunnels and drains." By Paragraph 29 of that section the Council is given power to "construct and keep in repair culverts, drains, sewers and cesspools." By Paragraph 57 of that section it is given power to regulate "the construction, repairs and use of vaults, cisterns, areas, hydrants, pumps, sewers and gutters."

By the act concerning local improvements, approved June 14, 1897, the City is empowered to "make such local improvements as are authorized by law, by special assessment, or by special taxation of contiguous property, or by general taxation or otherwise" as it shall by ordinance prescribe. By Section 54 of the act just cited, it is provided that "It shall be no objection to the legality of any local improvement that a similar one shall have been previously made in the same locality, if the ordinance therefor be recommended by the Board of Local Improvements as above provided."

It is well settled that the power to make local improvements is a continuing power and is not exhausted by being once exercised. (2 Dillon on Mun. Corp., 4th Ed., 686, 780.) It is equally well settled that the City has power to construct a new sewer by special assessment when the old one proves inadequate. (*Hall v. Street Com'rs*, 177 Mass. 343; *Bayone v. Morris*, 61 N. J. L. 137.) Other eminent authorities hold that the City can levy a special assessment to repair an old sewer built by general taxation. (2 Cooley on Taxation, 3d Ed., 1175; *Hunter's Appeal*, 71 Conn. 189.)

It seems to me that this particular case is very much like the cases of *Gurnee v. Chicago*, 40 Ill. 165, 170, and *Bush v. Peoria*, 215 Ill. 515, in which our Supreme Court held that if the proposed improvement is in fact a rebuilding or reconstruction amounting to the building of a new pavement, it is clearly within the power of the City to do it by special

assessment. The argument and reasonings are the same, and if it is the fact in this particular case that the present sewer has become inadequate or that the proposed improvements will make it so, then it is clearly within the right of the City to levy the necessary special assessment for the reconstruction of the new sewer.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

**Taxes Due the City for the Use of Trackage and
Grounds Within the City Limits by
Certain Railroads.**

December 27, 1905.

TO ILLINOIS CENTRAL R. R. COMPANY,
MICHIGAN CENTRAL R. R. COMPANY,
WISCONSIN CENTRAL R. R. COMPANY, and
NEW YORK CENTRAL R. R. COMPANY,

Gentlemen:

There has been brought to the attention of this office satisfactory information that your lines have been using the trackage, terminal grounds and houses of the Illinois Central Railroad Company within the limits of the City of Chicago, and that such has been proceeding for more than one year last past; to wit, in some instances for five years.

I beg to inform you that the legal judgment of this office is that for such uses taxes should be paid to the City of Chicago, and that the Illinois Central is not exempt from such taxes in the City in so far as the track terminals within the corporate limits of the City is concerned. An exemption to the said Illinois Central does not comprehend nor include tracks within the City limits of the City of Chicago for ter-

minal buildings or grounds. Also that to whatever extent exemption exists the rights of the Michigan Central, Wisconsin Central and New York Central Railroad Companies to use the said tracks, grounds and terminals depend wholly upon the consent of the City of Chicago, together with the rights under the laws of commerce, and that for such privileges the said Michigan Central, Wisconsin Central, Illinois Central, and New York Central Railroad Companies are here now demanded to pay taxes to the City of Chicago for the uses of the said trackage and terminal grounds; to wit, as property held and exercised by the companies in this notice here in our name.

You and each of you will please take notice that upon the basis of the ratio of taxation permitted by the laws of this State, there is now due from each of you to the City of Chicago, for the time within the Statute of Limitation not yet paid for by either of you; to wit, the sum of \$75,000. Further details to which you and each of you may have upon demand from this office.

You are respectfully requested, through such agency as you may select, to take this subject up to the end that the said taxes for the past dates be paid and arrangements for future charges for the enjoyment of the privileges herein referred to be entered into and made.

Very respectfully,

JAMES HAMILTON LEWIS,

Corporation Counsel.

Sale of Restored Evaporated Milk in Competition With Unchanged Milk.

December 28, 1905.

J. F. BEHN, M. D., Director of Municipal Laboratory.

Dear Sir:

I am in receipt of your favor of the 27th inst., addressed to the Corporation Counsel, enclosing a letter from

Adolph Gehrman, the bacteriologist of the Columbus Laboratories bearing date of the 19th inst.

The question submitted by Dr. Gehrman is whether under the City ordinances, the Columbus Laboratories may filter milk through paper filters, then partially sterilize it by drawing it through a continuous current of air at 140 degrees fahrenheit until the milk is reduced to one-fourth of its original volume, and after the product is placed in sealed cans and shipped into the City add enough sterilized water to replace that abstracted by the heated air.

I am of the opinion that the sale of milk so treated would be a violation of Sections 1135 and 1136 of the Revised Municipal Code of 1905, and possibly also a violation of Section 1138 relating to condensed and evaporated milk and cream. You, yourself, must be a better judge than anyone in this department as to whether your test would enable you to determine if the amount of water added to the reduced milk does not exceed the amount abstracted by the reducing process mentioned by Dr. Gehrman. Speaking without the aid of any scientific knowledge on the subject I would suggest that when the milk has been reduced by the evaporating process mentioned it should be regarded as evaporated milk which could only be sold in the City in accordance with the provisions of the ordinance relating to that product, and that, therefore, the Columbus Laboratories have no right to transform or manufacture from evaporated milk a product which it sells as and in competition with natural and unchanged milk.

Very truly yours,
MACLAY HOYNE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

**Illegality of Paying Interest on Assessments Not
Divided Into Installments—Power of City to
Refund Interest Unlawfully Collected.**

January 9, 1906.

HON. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

I return herewith the letter addressed to you by Mr. John A. May, secretary of the Board of Local Improvements, in response to your letter of June 8, 1905, relative to vouchers issued upon special assessment warrants, in which you raise the question whether or not the City can lawfully pay interest upon a special assessment that is payable in one installment only, and whether it can levy any special assessment for the purpose of raising money to be used in paying such interest.

In the case of *McChesney v. Chicago*, 213 Ill. 592, the point was made that that particular assessment was not divided into installments, and that it was erroneous to charge or collect interest upon the assessment. The court sustained this point, holding that the Special Assessment Act which provides for interest applies only to those assessments that are divided into installments, and that an assessment payable in a single payment is not one upon which interest can be paid, saying that, "In the absence of statutory authority a city council had no right to require the payment of interest which is never allowed unless given by statute." This decision not only prohibits the payment of interest in the future, but renders illegal all payments of interest that have already been made. It does not matter that in the particular assessment a contract was made or the warrants were issued; the City had no power to contract that it would pay interest on such an assessment.

As something was said in the course of our conversation about the City's right to refund what it has collected for interest, I would call your attention to the case of *Conkling*

v. *City of Springfield*, 132 Ill. 420, which is a suit by Conkling to recover certain taxes that had been paid under protest, and which he declared were illegal. The City had passed an ordinance providing that whenever any owner of taxable property, taxed for certain years therein named, should present to the comptroller a signed tax receipt showing that he had paid city taxes in excess of certain rates therein mentioned, it should be the duty of the comptroller to ascertain the amount of the excess and issue a certificate therefor, which certificate should be accepted thereafter in payment of said taxes. Conkling presented his receipt and obtained his certificate, and, as it was not accepted in payment of taxes, he sued to recover the amount therein named. It was claimed therein that the City was liable because it had promised to refund the tax. In speaking of this feature of the case the court said:

“If the City of Springfield had received from the plaintiff a sum of money in payment of illegal or void taxes, and after having received the money agreed to refund the amount so received, we see no reason why an action might not be maintained upon such an agreement. But the trouble here is the evidence disclosed no agreement to refund.”

In *Cooley on Taxation* it is stated that there is no reason apparent why a municipality cannot lawfully refund taxes illegally levied and collected.

We are therefore of the opinion, not only that all assessments levied for the purpose of raising money to be used in paying interest upon special assessments that are payable in one payment only, are absolutely void, but also that the City has ample power to refund any such assessments that it has already collected. Inasmuch as the City had no lawful right to levy or collect any money for the payment of this interest, whatever sums of money it has collected for that purpose it must hold in trust for those who have paid the money.

Yours truly,

WM. D. BARGE,

Approved: *Assistant Corporation Counsel.*

JAMES HAMILTON LEWIS,

Corporation Counsel.

Interest Unlawfully Collected Upon Special Assessments Payable in One Installment.

January 15, 1906.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

In your communication of the 9th inst. addressed to the Corporation Counsel you request an opinion as to whether the Comptroller shall pay out interest collected on special assessment flat warrants to the contractors or their assignees, or to the property owners.

In your letter you refer to an opinion rendered by the Corporation Counsel to Mr. E. M. Lahiff, dated April 8, 1905. This opinion, directed to the City Collector, held, upon the authority of *McChesney v. City of Chicago*, 213 Ill. 562, that interest was not collectible on assessments payable in one installment. It appears that, nevertheless, the City Collector collected interest on all flat assessments where confirmation judgments had been rendered prior to the decision in the case above referred to.

January 9, 1906, Assistant Corporation Counsel Barge advised Mr. Gosselin, the Deputy Comptroller, not to pay out interest which had been so collected, to the contractors, taking the position that the City should hold the interest it had received, in trust for those who had paid the money.

My attention has been called to a dictum of Mr. Chief Justice Scott in the case of *Town of Aurora v. C. B. & Q. R. R. Co.*, 119 Ill. 246, where it was held that, where a special tax is levied and collected by a town to pay void bonds issued by it, in aid of a railway company, and the supervisor is directed, by a resolution of the voters of the town, at their annual meeting, to pay over such taxes to the commissioners of highways, to be used as a bridge fund, a taxpayer may enjoin such application of the fund as to the amount of such taxes paid by him, such taxpayer being entitled to have the taxes paid by him appropriated for the purpose for which

the tax was levied and collected. In his opinion Judge Scott said (p. 249) :

“It is said, and the admission is, that these particular bonds have been declared by the State and Federal courts to be void, and hence it is insisted the town authorities have no right to use the funds for their payment. It may be, and doubtless is, true, no payment of these funds could be made *without the consent* of the taxpayer who has contributed to the funds; but if any taxpayer wishes to have the amount of the tax he has paid in, appropriated in that way, there is certainly no reason why he may not have it so appropriated.”

If the foregoing statement is good law and applicable to this case, the City has no right to pay the interest which it has collected on flat assessments, to the contractors or their assignees, without the consent of the persons who have paid that interest. I feel some doubt as to whether the foregoing statement is a correct presentation of the law on the subject, and it will be noticed that the court cites no authorities in support of this view.

It would seem to me that, inasmuch as the property owners stood by and permitted confirmation judgments to be obtained without raising any objection to the assessment because of the inclusion of interest, the payments of interest must be regarded as voluntary payments, made by them under a mistake of law, and which therefore they could not recover back; nor would it seem that the contractor is in a position to enforce payment by the City of interest collected by it. We have, then, a case of conflicting equities. The various contractors interested in the fund now in the City's hands, contracted on the understanding that they were to receive five per cent interest on the amount of the assessment. The City advertised for bids on the same basis. On the other hand, the property owners, being in ignorance of the law, made no objection to the assessment because interest at five per cent was required. It is not to be supposed that they would have failed to object in the proceeding brought to obtain final judgments if they had been aware that they were not liable to pay interest.

I have said enough, I think, to show that there is doubt as to which parties have the superior equity in the present case, and that there also is some doubt as to whether the City would be under any legal liability to the property owners who contributed the interest if without their consent it pays the same over to the contractors.

I would therefore suggest that for the present the fund now in your hands be held as a trust fund until some means are suggested for arriving at a settlement between the conflicting interests.

Very truly yours,
 MACLAY HOYNE,
Acting Corporation Counsel.

Power of City Council to Regulate Bill-boards.

January 30, 1906.

HON. WINFIELD P. DUNNE, Chairman, Sub-Committee of
 Committee on Judiciary.

Dear Sir:

This department has been requested for an opinion as to the power of the City Council to regulate bill-boards on private property—especially as to height of same, length, distance back from lot line and space between two such boards.

Our Supreme Court in *City v. Gunning*, 214 Ill. 628, holds that the City has such power and can regulate the use and construction of the same within their corporate limits, provided the regulation is not unreasonable.

The other questions can be best answered by considering what views the courts have taken of the matter and the reasons that have controlled their decisions in such particulars.

In *City of Rochester v. West*, 164 N. Y. 510, the ordinance provided that “no person shall hereafter erect any bill-board more than 6 feet in height within the City of Rochester, without permission of the Common Council.”

It was held by the Court of Appeals that the ordinance in question is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property.

In *Crawford v. City of Topeka*, 51 Kan. 762 (20 L. R. A. 692), the ordinance provided that "no person shall erect any billboard or other structure for advertising purposes, unless the same is placed at such distance from the line of any street or sidewalk as shall exceed at least by five feet the height of such billboard or structure."

This ordinance the court held unreasonable and invalid, and said:

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health or comfort of the public; but a limitation without reason or necessity cannot be enforced. In what way can the erection of a *safe structure* for advertising purposes near the front of a lot endanger public safety any more than a like structure for some other lawful purpose? Why does the posting or painting of an advertisement upon a secure wall or structure render it insecure? An owner may desire to use a structure or billboard for an inclosure of his lot, as well as for posting advertisements. If the wall or inclosure be ten feet high, then under the ordinance, the owner would be required to set it back fifteen feet from the front of the lot. What reason is there for the surrender or loss of the use of that portion of the lot? Or why should the pasting of a piece of paper upon a secure inclosure make such a loss necessary? Although the police power is a broad one, it is not without limitations, and a secure structure, which is not an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat and then prohibited."

In this case it appears that in some instances structures like fences were already upon the lots and in others, agreements with owners provided that the structures should inclose the lots as a fence. Many of them had been in existence for several years. Most of them were substantial and safe structures and the objection by the City authorities was not that they were insecure, but rather that they did not comply with the provisions of the ordinance.

In re Wilshire, 103 Fed. Rep. 620, an ordinance of City of Los Angeles made it unlawful "to erect, maintain, etc., * * * any fence, building or structure to a greater height than 6 feet, to be used for advertising purposes," etc.

In the opinion the court says:

"It must be admitted that the limit prescribed approaches very closely, if it does not reach, the point of unreasonableness. But between the line above which the height prescribed would be obviously reasonable and below which it would be obviously unreasonable is a range concerning which reasonable and fair minded men may differ. The action of the municipal authorities exercised within that range, ought not, in my opinion, to be interfered with by the courts. In a recent case before Judge Rhodes that learned judge declined to interfere with an ordinance fixing 10 feet as a maximum height for the erection of such structures, saying in his opinion:

" 'In this case, if the prohibition were against a height above 50 feet, there could be no question of its validity, any more than there would be in other cases given as to the height of houses. If they were limited to only 2 feet, it would be equally clear that it would be unreasonable. Now, between these points there is a reasonable limit. The authorities that have passed the ordinances have said that, in their opinion, 10 feet is not an unreasonable limit. Can the court take upon itself to say that it is unreasonable? If they had said 8 feet, or 9 feet, or 10 feet, or 12 feet, it is very difficult to find any point where the court could intervene, and hold that the limitation of the height is not reasonable. I do not think the court can declare that 10 feet is unreasonable.'

"I entertain a good deal of doubt in respect to the reasonableness of the maximum limitation placed upon the structures in question by the municipal authorities of the City of Los Angeles, but the fact that this doubt exists is sufficient reason for the court to decline to adjudge the ordinance invalid."

In *Whitmier & Filbrick Co. v. City of Buffalo*, 118 Fed. Rep. 773, the ordinance provided that:

"No person shall hereafter erect any fence or billboard more than 7 feet in height within the City of Buffalo without the permission of the Common Council," etc.

In that case the fences and billboards were on private property.

The court says:

“* * * It must be held here that the ordinance, under the circumstances, in its most progressive scope, comes within the purview of the police power of the city. The enactment prohibiting the erection of fences and billboards more than 7 feet in height is not unreasonable.”

The court quotes from *City of Rochester v. West* as follows:

“If the defendant’s authority to erect billboards was wholly unlimited as to *height* and *dimensions*, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them.”

In *City v. Gunning*, 214 Ill. 628, the court says:

“If boards are erected in violation of any of these public rights or interests, and of others which might be mentioned, there is ample power within the statute to regulate them, provided such regulations are reasonably necessary for the protection of the public health, morals or safety.”

“We do not hold that this ordinance is so unreasonable as to be void *if it were limited to particular districts of the city.*”

In all the cases I have examined except the Illinois case, the ordinances in question confined the regulation to one single restriction—the height of the structure used as a billboard. There was no discrimination or attempt to regulate the area or location of such structures (except in the Kansas case where the restriction as to location was involved).

The whole matter resolves itself into a determination of what is and what is not the exercise of reasonable discretion on the part of the legislative body.

In the *Gunning* case the court held the ordinance invalid and unreasonable because of the burdensome provision relating to billboards in existence before its passage, and because the ordinance applies alike in its restrictions to sparsely settled and densely settled localities. To overcome the objec-

tion as to locality the Tolman ordinance adopts as its basis the division of the City as made by the fire limit ordinance. Such division is practicable and in my opinion is not open to objection as being either unreasonable or arbitrary.

In its opinion the court does not consider with favor the restriction as to height (10 feet) or distance back of street line (25 feet) or area (100 sq. ft.) of billboards, and says they are unreasonable.

The 25-foot provision and the 5-foot provision are not applicable under the Tolman ordinance to billboards placed upon roof of any building. Against billboards 12 feet or less in area there is no restriction whatever.

Under the Tolman ordinance could not a line of these boards 12 feet high and 1 foot wide be placed along the sidewalk throughout the entire frontage of the lot?

Upon all the questions submitted the Council is vested with power to legislate and a court will with great reluctance interfere to review and correct the discretion involved in the legislative acts of such body.

Respectfully submitted,

W. W. DE ARMOND,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

Compensation for Firemen Employed at Theaters.

February 14, 1906.

FRANK I. BENNETT, ESQ., Chairman, Committee on Finance.

Dear Sir:

Your letter to this department concerning the rights of the City relating to compensation for firemen employed at theaters was referred to me for an opinion.

In an opinion given to the City Auditor some time ago I stated that I did not believe that special police and fire

protection could be forced upon theater owners without their consent and at their expense by compelling them to employ City policemen and firemen. I am informed that as a result of this opinion the policemen and firemen detailed in accordance with the ordinance at theaters where payment was refused have been withdrawn. While I still adhere to this opinion, I do not think the principles of law underlying the case are so well settled that the City should yield its claims for services rendered heretofore without testing the matter.

The right of the City to compel theater owners to employ City firemen and policemen is involved in much doubt. None of the text-book writers have gone into the subject deeply. Those that have touched upon it seem to agree that the City has no such right. Am. & Eng. Law, First Ed., Vol. 25, p. 1023.

McQuillin on Mun. Ord., Sec. 188.

Smith on Mun. Corp., Secs. 95 & 96.

I have searched the reports diligently to find authorities on the precise question involved, but have been able to find only one case which is directly in point. That is the old case of *Waters v. Leech*, 3 Ark. 110, in which the court held that an ordinance which required the City constable to attend at theaters and compelling the proprietors to pay for such attendance, was unreasonable and void.

“But we are at a loss to know by what power, after authorizing the exhibition at the theater, and thereby rendering it lawful, an additional imposition of two dollars and fifty cents for each performance should be ordered to be paid to the City Constable by the owner or exhibitor, *who is no party to the contract*, and who did not require the services of the Constable. Is it reasonable? The tax of twenty dollars per month is two hundred and forty per annum, and if the performance should continue during the year, it would add to the emoluments of the defendant in error seven hundred and thirty-two dollars and fifty cents, for which the other would derive no benefit or consideration. Suppose the corporation was to pass an ordinance that the City Constable should attend every day upon each and every dramshop, or other drinking establishments and

that the owner or keeper thereof should pay such Constable two dollars and fifty cents per day therefor, would such an ordinance be considered within the proper and legitimate authority of the charter? Would this be a reasonable exercise of power? If the principle is admitted that under the general power of providing by ordinances and by-laws for the preservation of good order within the limits of the City, the corporation can do this, where, we would inquire, is the limit to their authority? They may, with the same propriety, make his duty extend to standing guard over dram-shops and drinking establishments, and at the stores of the citizens, thereby rendering those laws and ordinances oppressive and injurious, under the specious pretence of suppressing riot or tumult which might or might not take place."

While the case cited is not strictly analogous, since the fee imposed went to the constable instead of to the municipality, still the principle involved is the same, and the law, in my opinion, is stated correctly.

The rule is well settled that where there is a doubt as to the right of a municipality, under the powers delegated to it, to do an act, such doubt must be resolved adversely to the municipality.

City of Chicago v. Collins, 175 Ill. 445-458.

On the other hand, it is within the power of the City to compel theater owners to conform indirectly to such a regulation, such power being subject only to the 14th Amendment to the Constitution of the United States, which prohibits the State from depriving a person of property without due process of law.

Where absolute control over the whole subject of granting licenses is conferred, the City may impose, besides a license fee, bond, etc., other conditions calculated to protect the community. Such power grows out of the fact that where it is discretionary to prohibit, the City may impose such terms as it sees fit.

Schwuchow v. City of Chicago, 68 Ill. 444.

Launder v. City of Chicago, 111 Ill. 291.

It has been held that if an applicant for a license accepts a license under the conditions imposed he assents to same and is bound by the ordinance.

Malkan v. City of Chicago, 217 Ill. 477.

It is also well established that a business may be taxed for the purpose of providing the means necessary to regulate it and to protect the public from injury which might result therefrom.

In *Morgan v. Louisiana*, 118 U. S. 455-466, it was held that vessels may be required to pay for the examination of same as a part of the quarantine system.

The expense of compulsory examination of engineers for color-blindness is properly chargeable against a railroad company.

Nashville, etc. Ry. v. Alabama, 128 U. S. 96, 101.

Insurance companies may be made to support a state insurance department.

St. Louis Mut. L. Ins. Co. v. St. Louis County, 56 Mo. 503.

A statute assessing the salaries and expenses of an electrical board upon the several companies operating electrical conductors in any city in that state was held a constitutional exercise of the general police powers of the State.

People, etc. v. Squire, 145 U. S. 175.

Same, 107 N. Y. 593.

Where additional labor of officers and other expenses are imposed upon the public by a business, the municipality may charge a sufficient license fee to cover the same.

Jacksonville v. Ledwith, 26 Fla. 163.

Railroad companies may be required to pay the salaries and expenses of a state railroad commission.

Charlotte, etc. R. R. Co. v. Gibbs, 142 U. S. 386.

In the last case cited the court said:

“That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the pub-

lic in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the Fourteenth Amendment."

Where the imposition of an assessment or charge upon a certain occupation is not a tax for purposes of general revenue, but grows out of the supervisory power of the government over the business on which it is levied it is not double taxation.

P. C. & St. L. R. Co. v. State of Ohio, 16 L. R. A. 382.

From the above authorities it will be seen that the dividing line between what the City may or may not do in the way of imposing conditions on this class of business is not so well marked that it can be said with certainty that the City is powerless to enforce its demands growing out of the enforcement of the ordinance as it stands. It certainly has the right to collect compensation in all those cases where it permitted the theaters to run during the time they were making alterations in the buildings to conform to the ordinance, when they agreed to employ and pay for policemen and firemen and furnished a bond to that effect. As a result of the enforcement of the ordinances there are a number of suits now pending in which the questions at issue will be adjudicated. The principal one is the case of *Weber v. City*,

a chancery case, which is in such shape that a court of equity may take cognizance of the whole subject-matter and decide all the points involved. An effort is being made to get a final decree in this case in time to get the cause into the Appellate Court for the March term, so that a decision may be looked for from that tribunal during this year.

Such being the case it would not be proper for this department to desist in its efforts to collect from the various theater owners who have refused to pay. Nor would it be proper for any other City official to charge off from the City's books the amounts which appear against such theater owners for the services of firemen and policemen.

It would be advisable, however, to change the ordinance in such a way as to compel theater owners themselves to employ firemen who may be examined as to their qualifications by the Fire Marshal and be subject to the jurisdiction of the Fire Department. Such an ordinance, I am convinced, would be valid, and would accomplish the desired object of providing adequate protection to the public.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

In re Application of Certain Street Car Lines to Put in Temporary Curves.

February 16, 1906.

HON. JOSEPH M. PATTERSON, Commissioner of Public Works.

Dear Sir:

You have referred to this department applications of the Chicago City Railway Company for permits to put in temporary curves at 39th and Halsted streets; 39th and Wallace streets, and 35th street and Indiana avenue. These

curves, according to the statement contained in the applications, are made necessary by reason of track elevation which interferes with the ordinary traffic on the lines at such corners. After consulting with Major Tolman, I have come to the conclusion that it would be proper to issue temporary permits as applied for. Said permits, however, should contain the following provisions:

1. They should state that the permission to construct and operate said curves is temporary, and revocable at any time within the discretion of the Mayor.

2. That the permission is granted by reason of the fact that the work of track elevation interferes with the handling of cars at the places stated, and the purpose for which the temporary curves are to be used should also be stated.

3. The permits should specify a date on which the temporary curves should be removed and the streets replaced in the same condition as they now are.

4. That the permits shall not in any way be held as a waiver of any of the rights of the City in regard to any matters in controversy between the City and the railway company, nor to be regarded as a recognition of any claim of the railway company in regard to franchises.

With the above provisions inserted in the permits, they can safely be issued.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Assistant Corporation Counsel.

Classification of Businesses Which May be Licensed or Taxed by the City.

February 19, 1906.

HON. F. I. BENNETT, Chairman, Committee on Finance.

Dear Sir:

For some time I have been engaged in the preparation of a report as to the power of the City of Chicago to impose occupation or business taxes and license fees under the police power upon various kinds of business, enterprises, privileges, uses and things within the City of Chicago; first, with reference to the power of the City to impose taxes and license under its present charter; second, with reference to the taxes and license fees now prescribed by the Revised Municipal Code of 1905; and, third, with reference to the powers that might be delegated to the City by the General Assembly under the Constitution.

Although this report is not yet completed, I submit herewith, in accordance with your verbal request, a tabulated statement containing a list of the trades, occupations, enterprises, uses and things which the City now taxes or licenses, and which it might tax or license.

In the report above referred to and in the tabulated statement submitted herewith, I have divided the powers of the City under the Cities and Villages Act into classes. Class 1 includes those occupations, places, persons and things which the City may not only license and regulate, but may also *tax*, and those occupations, places, persons and things which the City may not only tax, license and regulate, but also suppress or prohibit. In this class is included every trade, occupation and thing which is subject to the taxing power of the City.

You will understand that under the power of taxation the City may impose a tax either in the form of a license fee or otherwise of any amount the City Council may deem proper. If there is any limitation upon the City's power

of taxation, it is merely the requirement that the tax shall not be a sum so large as will amount to a prohibition of the business taxed.

Class 2 includes those occupations, places, uses, practices, acts and things which the City may license, regulate and *prohibit*, or may regulate and prevent or prohibit.

There is also, practically, no limit to the amount of a license fee which the City may impose under the police power of prohibition. The rule is that the whole includes a part and the greater includes the lesser, and any trade, business or thing which the City may prohibit, may be permitted upon whatever conditions the City sees fit to impose.

Class 3 includes occupations, places, practices, acts and uses of streets, public grounds and private property which the City may regulate, require to be inspected, or the inspection of which it may regulate under the police powers expressly delegated to the City by the State. Our Supreme Court has frequently held that the police power of regulation includes the power to license.

Class 4 includes all those occupations, dealings, practices, uses, persons and things which the City may under its *general* or implied police power license as a means of regulation and collect license fees in the making and carrying on of the regulations. By the general police power of the City, I mean the power of the City to adopt measures and impose license fees relating to the life, liberty, safety, health, comfort and convenience of its inhabitants.

There is, of course, also a fifth class of license fees, so called, the validity of which depend upon contract and not upon the sovereign power of taxation or the police power under sovereign power. In this class are the so-called car license fees exacted from street railway companies; mileage taxes, and compensation exacted in various forms from corporations using the streets of the City. The validity of license fees, mileage taxes and other requirements for the payment of compensation frequently found in special ordinances of the City granting rights in the public streets to

street railways, gas companies, telephone companies and other *quasi* public corporations, rests upon the power delegated to the municipality by the Legislature of consenting to or refusing the use of the public streets by such corporations, and upon the acceptance by such corporations of the grants of privileges which contain provisions for compensation.

This latter class I do not deal with in the statement submitted herewith.

Yours very truly,
 MACLAY HOYNE,
First Assistant Corporation Counsel.

STATEMENT showing the occupations, trades, enterprises, privileges, uses and things which the City of Chicago may subject to taxation or license fees under its present Charter.

NOTE: In the statement which follows, in the first column appears the occupation, trade, enterprise, privilege, use or thing which may be subjected to a tax or license fee; in the second column appears the amount of the present tax or license fee, if there is any now prescribed by the code, or if no tax or license fee is fixed by the present code, then the word "no" appears in said second column. In the third column appears the section of the Revised Municipal Code of Chicago of 1905 which prescribed such tax or license fee. In the fourth column is noted the clause or clauses of Section I of Article V of the Cities and Villages Act from which the power of the City to impose a tax or license fee is derived. Instead of writing out the numbers of said clauses, figures merely are used. In the fifth column an interrogation point indicates that the power to tax or license is not established by our court. But it is to be understood that only those occupations, trades, etc., have been included in the following statement which it is believed may properly be subjected to the City's taxing or licensing power.

CLASS I.

THE CITY'S TAXING POWER.

Section 1 of Article V of the Cities and Villages Act vests in the City Council the following powers, among others:

"Forty-first—To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure."

"Forty-second—To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation."

"Forty-third—To license, regulate, tax and restrain runners for stages, cars, public houses, or other things or persons."

"Forty-fourth—To license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeon-hole or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alleys and ball alleys."

"Eightieth—To regulate, restrain and prohibit the running at large of horses, cattle, swine, sheep, goats, geese and dogs, and to impose a tax on dogs."

"Ninety-first—To tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery-stables, public scales, money changers and brokers."

"Ninety-fifth—To tax, license and regulate second-hand and junk stores, and to forbid their purchasing or receiving from minors, without the written consent of their parents or guardians, any article whatsoever."

Section 1 of an act approved June 16, 1887 (Hurd's Revised Statutes, 1903, Ch. 24, Sec. 62a, p. 295), gives the City Council "power to tax, regulate, suppress or prohibit itinerant merchants and transient vendors of merchandise."

CLASS 2.

THE CITY'S POLICE POWER OF PROHIBITION.

"Seventeenth—To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting hand bills and advertisements."

“Eighteenth—To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds, or upon the sidewalks.”

“Nineteenth—To regulate and prevent the flying of flags, banners or signs across the streets or from houses.”

“Twenty-fourth—To permit, regulate or prohibit the locating, constructing or laying a track of any horse railroad in any street, alley or public place; but such permission shall not be for a longer time than twenty years.”

“Thirty-fifth—To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor, or within such jurisdiction.”

“Forty-sixth—To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license; *Provided*, that the City Council in cities, or president and board of trustees in villages, may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinance: *Provided*, further, that in granting licenses, such corporate authorities shall comply with whatever general law of the State may be in force relative to the granting of licenses.”

“Sixty-fifth—To regulate and prevent storage of gun powder, tar, pitch, resin, coal-oil, benzine, turpentine, hemp, cotton, nitro, glycerine, petroleum, or any of the products thereof, and other combustible or explosive material, and the use of lights in stables, shops and other places, and the building of bonfires; also to regulate and restrain the use of fireworks, fire-crackers, torpedoes, Roman candles, sky-rockets and other pyrotechnic displays.”

“Eightieth—To regulate, restrain and prohibit the running at large of horses, cattle, swine, sheep, goats, geese and dogs, and to impose a tax on dogs.”

“Ninety-second—To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams and horses.”

“Ninety-third—To regulate and prohibit the keeping of any lumber yard, and the placing or piling or selling any lumber, timber, wood or other combustible material, within the fire limits of the City.”

CLASS 3.

THE CITY'S EXPRESS POLICE POWER OF REGULATION AND LICENSING.

“Fourth—To fix the amount, terms and manner of issuing and revoking licenses.”

“(Seventh—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.)”

“Ninth—To regulate the use of the same.”

“Thirteenth—To regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *Provided, however,* that any company heretofore organized under the general laws of this State, or any association of persons organized, or which may be hereafter organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this State, subject to such regulations as any such city or village may by ordinance impose.”

“Fourteenth—To regulate the use of sidewalks and all structures thereunder; and to require the owner or occupant of any premises to keep the sidewalks in front of, or along the same, free from snow and other obstructions.”

“Twentieth—To regulate traffic and sales upon the streets, sidewalks and public places.”

“Thirty-third—To regulate and control the use of public and private landing places, wharves, docks and levees.”

“Thirty-fourth—To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.”

“Thirty-seventh—To collect wharfage and dockage from all boats, rafts or other craft landing at or using any public landing place, wharf, dock or levee within the limits of the corporation.”

“Thirty-eighth—To make regulations in regard to use of harbors, towing of vessels, opening and passing of bridges.”

“Forty-ninth—To establish markets and market houses, and provide for the regulation and use thereof.”

“Fiftieth—To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.”

“Fifty-second—To regulate the sale of bread in the city or village; prescribe the weight and quality of bread in the loaf.”

“Fifty-third—To provide and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.”

“Fifty-fourth—To regulate the inspection, weighing and measuring of brick, lumber, fire-wood, coal, hay, and any article of merchandise.”

“Fifty-fifth—To provide for the inspection and sealing of weights and measures.”

“Fifty-sixth—To enforce the keeping and use of proper weights and measures by vendors.”

“Fifty-seventh—To regulate the construction, repairs and use of vaults, cisterns, areas, hydrants, pumps, sewers and gutters.”

“Fifty-eighth—To regulate places of amusement.”

“Sixtieth—To regulate partition fences and party walls.”

“Sixty-seventh—To provide for the inspection of steam boilers.”

“Seventy-seventh—To erect and establish hospitals and medical dispensaries, and control and regulate the same.”

“Seventy-ninth—To establish and regulate cemeteries within or without the corporation, and acquire lands therefor, by purchase or otherwise, and cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation.”

“Eighty-first—To direct the location and regulate the management and construction of packing houses, renderies, tallow chandleries, bone factories, soap factories and tanneries, within the limits of the city or village, and within the distance of one mile without the city or village limits.”

“Eighty-second—To direct the location and regulate the use and construction of breweries, distilleries, livery stables, blacksmith shops and foundries within the limits of the city or village.”

“Eighty-seventh—To establish ferries, toll bridges, and license and regulate the same, and from time to time fix tolls thereon.”

Section 1 of an act to protect the public from elevator accidents, in force July 1, 1903 (Hurd's Revised Statutes, 1903, p. 424), gives the City Council power to examine, license and regulate persons having control as starters or operators of all freight or passenger elevators.

Coal oil, naphtha, gasoline, benzine and other mineral oils or fluids must be inspected and the City may fix the amount of the fees to be charged for such inspection. (See an act to revise the law in relation to oil inspection, Hurd's Revised Statutes, 1903, p. 1290.)

CLASS 4.

THE CITY'S INCIDENTAL OR IMPLIED POLICE POWER OF LICENSING.

“Twenty-sixth—To require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle guards, crossings of streets and public roads, and keep the same in repair, within the limits of the corporation. In case any railroad company shall fail to comply with any such ordinance, it shall be liable for all damages the owner of any cattle or horses or other domestic animal may sustain by reason of injuries thereto while on the track of such railroad, in like manner and extent as under the general laws of this State, relative to the fencing of railroads; and actions to recover such damages may be instituted before any justice of the peace or other court of competent jurisdiction.”

“Twenty-seventh—To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads. To compel such railroads to raise or lower their railroad tracks to conform to any grade which may, at any time, be established by such city, and where such tracks run lengthwise of any such street,

alley or highway, to keep their railroad tracks on a level with the street surface, and so that such tracks may be crossed at any place on such street, alley or highway. To compel and require railroad companies to make and keep open and to keep in repair ditches, drains, sewers and culverts along and under their railroad tracks so that filthy or stagnant pools of water can not stand on their grounds or right of way, and so that the natural drainage of adjacent property shall not be impeded."

"Sixty-third—To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stove pipes, ovens, boilers and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition, when considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition."

"Sixty-sixth—To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"Seventy-eighth—To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

"Eighty-fourth—To compel the owner of any grocery, cellar, soap or tallow chandlery, tannery, stable, pig-sty, privy, sewer or other unwholesome or nauseous house or place, to cleanse, abate, or remove the same, and to regulate the location thereof."

"Ninety-sixth—To pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the City Council or Board of Trustees shall deem proper: *Provided*, no fine or penalty shall exceed \$200.00, and no imprisonment shall exceed six months for one offense."

Name	Amount	Section of Code	Clause
Cabmen & Hackmen	1.00	2265	42
1 horse—	2.50	2268	"
2 horses—	5.00	"	"
Omnibuses—	5.00		"
Omnibus drivers—	no		
Carettes—	no		

All other elevated railroads doing a local business—			
Telephone & Telegraph companies—			
Steam Railroads—			
Carters—	no	2328	42
1 horse—	2.50	"	"
2 horses—	5.00	"	"
Expressmen	no	"	"
1 horse—	2.50	"	"
2 horses—	5.00	"	"
Draymen—	no	"	"
1 horse—	2.50	"	"
2 horses—	5.00	"	"
Coaches—	no		
Stages—	no		
Baggage Transfer Companies—	no		
Moving vans		"	"
1 horse—	2.50	"	"
2 horses—	5.00	"	"
Machinery, Safe & Piano Movers—	no		
Express Companies	no		
Teaming & Transfer Companies—	no		
Porters—			
And all other persons & cor- porations engaged in the business of carrying persons and goods for hire—			
Amusements—			
Exhibitions—			
Shows—			
Theatricals—			
(a)	\$500.00	105	41
(b)	300.00	"	"
(c)	200.00	"	"
Lecture Halls—	200.00		
Concert & Musical Halls	100.00	"	"
Circus & Menageries			
(a)			
(b)	300.00 per day	102	"
	50.00 " week	"	"
Menageries, building & etc.	200.00 " day	"	"
Shows in tents—	10.00 " day	"	"
Moving picture exhibitions—			
(a)	10.00 " day	"	"
(b)	50.00 " day	"	"
Itinerant shows—machines & batteries—	10.00 " month	"	"
Horse shows, stock shows—	10.00 " day	"	"
Dog shows—	10.00 " day	"	"
Cat shows—	10.00 " day	"	"
Automobile shows—	10.00 " day	"	"
Merry-go-rounds & slides—	2.00 " day	"	"
Rinks—	2.00 " day	"	"
Amusement parks & gardens—	50.00 " day	"	"

Summer gardens—	20.00	“ week	“	“
Dances & Bazaars—	5.00	“ day	“	“
Exhibitions & fire works—	50.00	“ day	“	“
Mutoscope parlors & automatic moving pictures—	200.00	“ year	“	“
All other exhibitions, shows & amusements—	2.00	“ day		
Wild West shows (so called)—				
Dime museums—				
Keepers of Ordinaries—				41
Pawn Brokers—	300.00	“ year	1574	41
Peddlers & Hawkers—	50.00	“ wagon	1592	“
Beer peddlers—				“
Oil Peddlers—				“
Milk peddlers—			“	“
Oil & Wood peddlers—	10.00		“	“
Hand cart peddlers—	25.00	“ cart	1593	“
Pack peddlers—	15.00		1594	“
And all other peddlers & hawkers—				
Runners of all kinds—	\$12.00 per year		2017	43
Billiard & Pool tables in public places—	10.00 per table		166	44
Baggabelle tables—				“
Pigeon Hole tables—				“
Similar tables—				“
Pin alley—	10.00 per alley		“	“
Ball alley—	10.00 “ “		“	“
Bowling alley—	10.00 “ “		“	“
Shooting gallery—	25.00		2057	44
Rifle range—	“		“	“
Auctioneers—	300.00		125	91
Special permits for auctions—	10.00		130	91
Brewers—(local—	500.00		1356	“
All Brokers	25.00		192	“
Bond brokers —	25.00		“	“
Stock Brokers—	“		“	“
Commission Brokers—	“		“	“
Merchandise Brokers—	“		“	“
Insurance Brokers—	“		“	“
Grain & Provision Brokers—	“		“	“
Loan Brokers—	“		“	“
Provision Brokers—	“		“	“
(Or Commission merchants)				
Distillers—(Local—)	500.00		1356	“
Non-resident brewers or their agents—				
Livery stables—(a)	25.00		2370	“
(b)	25.00 plus \$5.00 for each vehicle drawn by two or more horses, and \$5.00 for each automobile holding more than 4 persons, and plus, also \$2.50 for each one horse vehicle and automobile hold- ing three persons or less		“	“
Lumber Yards—	100.00		1379	“
Money changers—(Bankers) (State Bank)				

CLASS 2.

THE CITY'S POWER OF PROHIBITION.

Street Railways (trolley poles & wires)—			17
Telephone Companies (poles & wires)—			"
Telegraph Companies (poles & wires)—			"
Electric Lighting Companies (poles & wires)—			"
Awnings—(in streets)—			"
Awning posts (in streets)—			"
Advertisements (in streets)—			
Horse troughs (in streets)—			
Signs (sign posts in streets)—			
Projecting electric signs)—15c per sq. ft.		2182	"
		"	"
Flat electric signs—			
Temporary Electric signs—	1/4 annual rate	"	"
Posting hand bills—			17
Bill Posters			
(a) using wagon	\$100.00	171	"
(b)	25.00	"	"
Racks—			"
Exhibition or a carrying of advertisements—(in streets)			18
Exhibition or a carrying of banners (in streets)			"
Exhibition or a carrying of hand-bills (in streets)—			"
Exhibition or a carrying of flags (in streets)			19
Exhibition or a carrying of placards (in streets)			18
Flying of banners (across streets)			19
Flying of flags (across streets)			"
Public Scales			
Dogs—	\$2.00	754	80
All Junk Dealers—			95
All Second-hand dealers—			"
Junk shops—	50.00	2036	"
Junk Wagons—	10.00	"	"
Junk boats—	50.00	2038	"
Dealers in second-hand furniture—	50.00	"	"
Dealers in second-hand clothes—	50.00	"	"
Dealers in other second-hand articles—	50.00	"	"
Dealers in second-hand auto-mobiles—bicycles & vehicles—			

Itinerant merchants (see peddlers)			
Transient Venders (see peddlers)			
Flying of signs (in streets)			19
Street Railway (tracks in streets)			24
Harbor tugs engaged in local business			35
Wharf boats engaged in local business			"
Other harbor boats in local business			"
Excursion boats in local business			"
Dram shops—	\$500.00	1339	
Wholesale malt liquor dealers			46
(a)	50.00	1361	"
(b)	500.00	"	"
Wholesale spirituous liquor dealers	100.00	1369	"
Wholesale vinous liquor dealers	50.00	1375	"
Druggists for selling liquor	5.00	780	"
Foreign Brewery agents			"
Foreign Wine agents			"
Foreign Distillery agents			"
Storage of benzine			65
Storage of coal oil			"
Storage of other oil			"
Storage of gasoline			"
Storage of naphtha			"
Storage of petroleum			"
Storage of pitch			"
Storage of resin			"
Storage of tar			"
Storage of nitro glycerine			
(a)	25.00	959	"
(b)	10.00	"	"
Storage of hemp			"
Storage of cotton			"
Storage of other combustible material			"
Storage of other explosives			
(a)	25.00	959	65
(b)	10.00	"	"
Painters			"
Paint shops			"
Paint manufacturers			"
Roofers' shops			"
Roofers (using wagons)	10.00	2012	"
Artists' supplies			"
Photographers' supplies			"
Photographers			"
Chemists			"
Hemp manufacturers			"
Hemp dealers (1)			"

Cotton manufacturers				"
Cotton dealers				"
Dealers in feathers				"
Box manufacturers				"
Furniture manufacturers & dealers				"
Glue manufacturers				"
Feed dealers				"
Grain dealers				"
Hay dealers				"
Dealers in hides & tallow				"
Boot & shoe manufacturers				"
Fur dealers & Manufacturers				"
Lace, Carpet & Curtain cleaners				"
Mattress manufacturers				"
Dealers in ropes, cordage & rosin				"
Varnish Mfrs. & dealers				"
White lead Manufacturers & dealers				"
Wall paper manufacturers				65
Dyers & Cleaners				"
Envelope makers & dealers				"
Fireworks—use of				"
Fire crackers—use of				"
Roman candles—use of				"
Sky rockets—use of				"
Torpedoes—use of				"
Fireworks—dealers				"
Fireworks—manufacturers				"
Lumber yards	100.00	1379	93 (& 91 see Class 1.)	
Sale or placing of lumber (within fire limits)				93
Sale or placing of timber (within fire limits)				"
Sale or placing of wood (within fire limits)				"
Or other combustible mate- rial (within fire limits)				"
Dealers & Manufacturers of barrels				"
Dealers & Manufacturers of charcoal				"
Dealers in kindling wood				"
Dealers in lubricators & oils				"
Dealers & manufacturers of paper and paper boxes				"
Dealers & Manufacturers of picture frames & mouldings				"

Lost Water Certificates—Issuing of New Certificates and Protecting City by Bond.

March 1, 1906.

FRANK I. BENNETT, Esq., Chairman, Finance Committee.

Dear Sir:

Your letter of recent date concerning the draft of an order prepared in this office and submitted to the Finance Committee relating to the issuance of new water certificates as directed by the Superior Court of Cook County in case known as General No. 235287, was referred to me for an opinion.

The suit in question arose on account of the loss of two water certificates and a gas certificate which equitably belonged to the Auburn Park Land Trust, but which were issued in the name of Doctor S. Place, now deceased. The City and the Peoples Gas, Light & Coke Company were made parties to a supplemental bill filed in said cause. All parties in interest were made defendants and were served either by summons or by publication. The only interest the City had in the suit was to protect itself against the possibility of someone claiming on the original certificates which had been lost.

The Gas Company's interest in the cause was identical with the City's. Inasmuch as the parties who have the certificates at the present time, if they are in existence, were unknown and were described as the unknown holder or holders, claimant or claimants, etc., I deemed it important that the court should in the decree require that a bond be given to the City to save it harmless and to indemnify it in case of loss on account of any litigation which might arise at some future time by the unknown holders of these certificates. This was also done by the Gas Company and the court acceded to this reasonable request on our part and incorporated that in the decree. The bond was prepared and filed with the Comptroller.

Under the circumstances I see no way in which it is possible for the City to suffer if duplicate certificates are issued. Having that in view I drew the order which you have before you, which means nothing more than that duplicates shall be issued in place of water certificates which have disappeared, and the same will not cause the City any loss under any circumstances. I am of the opinion that the court had jurisdiction and that the City is bound by its order, and therefore, that the certificates should be issued.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

Act Requiring Consents to Authorize Manufacture of Explosives Does Not Apply to Acetylene Gas.

March 6, 1906.

HON. JOHN J. BRADLEY, Chairman, Sub-Committee of Committee on Judiciary.

Dear Sir:

Replying to your letter of March 5, 1906, concerning the applicability of the act requiring written consent of voters to authorize the making of explosives within a certain district, and prohibiting their manufacture within a city, etc., in the case of the ordinance relating to acetylene gas now pending before your committee, I beg leave to state that in my opinion the statute does not apply to the manufacture of such gas.

The act in question is a part of a criminal statute passed in 1887, being an amendment enacted in 1903. Wherever this section refers to an "explosive" or an "explosive compound," it must be taken to mean the same as those words mean in the remaining sections of that statute. The original

statute, like the amendment, relates to "dynamite, nitro-chlorate or other explosive compound." The statute clearly has reference to such explosives as are "intended to be used by exploding or igniting the same to produce a force to propel missiles or rend apart substances." In most of the statutes of the various states relating to this subject the word "explosive" is defined in this way, and, since our statute is designed generally to cover the same ground as the statutes in other states referred to, it must be assumed that an explosive, as the word is used in our statute, means the same.

Another reason for assuming this, is the fact that the kind of explosives intended are indicated by the use of the words "dynamite" and "nitro-chlorate." The maxim, "*Expressio unius est exclusio alterius*" therefore applies. The other compounds included in the statute must be of the same general character as the ones that are mentioned. It cannot be said that acetylene gas partakes of the character of dynamite or nitro-chlorate, nor is it intended to be used for purposes of explosion. It stands on the same footing as ordinary illuminating gas, which, under certain conditions, is also highly explosive.

It has been held that where the word "explosive" was used in an insurance policy it did not include a substance known as "flour dust," which, under certain circumstances, is explosive.

Washburn v. Miami Valley Ins. Co., 2 Fed. 633.

It must also be borne in mind that the statute referred to is highly penal in its nature. The purpose and intent of same may be gathered to some extent from the time of its enactment. This was shortly after the Haymarket Riot. The principal conviction under it was in the case of *Hronek v. People*, 134 Ill. 139. The intention clearly was to prohibit an *improper* use of such explosives, as expressed in the title of the act, and probably the reason for the enactment of the amendment was that the original statute practically prohibited the manufacture of such explosives for useful and lawful purposes.

From the above it must appear quite clear that the act was not intended to apply to such a case as you have before you.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
MACLAY HOYNE,
Assistant Corporation Counsel.

Violation of Ordinance With Reference to Fire Escapes on Buildings Used for Hotel Purposes.

March 21, 1906.

PETER BARTZEN, Esq., Commissioner of Buildings.

Dear Sir:

Replying to your letter of March 20th, in which you ask "Where a building used for hotel purposes is violating the Building Ordinance in regard to fire escapes and the managers after being fined refuse to comply with said ordinance, what legal procedure may I take? Can I proceed against them in a criminal action, and, if so, what is the procedure? Can I close the hotel?" I desire to state:

Section 273 of the Revised Municipal Code of Chicago of 1905 contains specifications in relation to stairways in buildings such as the one in question, and Sections 675 to 684 of the code, inclusive, contains specifications for fire escapes on such buildings. Section 738 of the code provides the penalty for violation of the Building Ordinance and Section 685 provides the penalty for violation of that section of the code in relation to fire escapes and notices in connection therewith.

Section 639 of the code reads as follows:

"639. STAIRS AND FIRE ESCAPES—OBSTRUCTION OF.)
It shall be unlawful under any circumstances to close up or obstruct during the occupation for business purposes of any building, the stairways or fire escapes or

the approaches leading thereto; and no change in the position or construction of any such stairway or fire escape shall be made, unless the permission so to do of the building department first shall have been obtained."

This section relates to a part of the violation in the building about which you spoke to me personally.

Section 684 of the code authorizes the Building Commissioner to close any building when said section is not complied with.

The only procedure that can be taken in relation to violation of this ordinance in court is to bring suit against the owners of said building for violation of the ordinance, each day being a separate violation, and the prosecution of these cases and the manner of enforcing the penalty is in the hands of the court and the prosecuting attorney's department.

Under Section 684, I am of the opinion that the authority is vested in you to take such steps as you deem necessary to close any buildings by and through the police power of the City of Chicago, where the ordinance as set forth in said section is not complied with.

All of which is respectfully submitted.

Yours very truly,

FRANK L. CHILDS,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

**Frontage Consents Not Required for Garages Erected
Before the Passage of the Ordinance
Requiring Same.**

March 26, 1906.

HON. JOHN E. TRAEGER, City Collector.

Dear Sir:

Your letter of recent date in which you inquire whether it will be necessary for a firm that has been conducting a garage within a residence district prior to the enactment of

the recent ordinance requiring frontage consents in such cases, to present a petition before a garage license will be issued, was referred to me for an answer.

The ordinance in question requires that when any person desires to locate, build, construct or maintain a garage on a lot fronting on a street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, such person must obtain the written consent of a majority of the property owners according to frontage on both sides of such street in said block.

I am of the opinion that where a person has been conducting such a place prior to the enactment of the ordinance, he will not be required to present a petition for the purpose of continuing his business at that location.

This department has always held in matters of this kind where a person has been conducting a business of a character which required frontage consents, that in case the building was erected before the district became a residence district he was entitled to remain and continue his business there, after the district was built up. In the same way this department has held that it was not necessary for such persons to present new petitions each year, in order to procure renewal of licenses, even though the ordinance required such consents for the "maintenance" of such business, as well as for the location and construction of same.

In order to be consistent, therefore, the same rule must be applied to garages. It would be unreasonable to demand that a person who erected his garage before there were any houses on a block, should now obtain frontage consents. It would also be unreasonable to require a person who had been running such a business right along to do so. A reasonable construction of the ordinance would be, that such frontage consents are required only when it is proposed to erect a new building to be devoted to the purpose named therein.

Yours respectfully,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

MACLAY HOYNE,

Assistant Corporation Counsel.

Damages Arising Out of the Construction of a Water Tunnel by the City Across Private Property.

May 4, 1906.

HON. FRANK I. BENNETT, Chairman, Committee on Finance.

Dear Sir:

We have your letter of April 28, enclosing some of the papers connected with the claim of William F. Grower against the City for damages to his lot at Madison street and the river, in which you ask a reply to these questions:

1. Is the City legally liable for the damage claimed, and, if so, what is the measure of damages?
2. Has the City a legal right to purchase this property, with a view of settling the controversy, providing satisfactory arrangements and price can be made with the owner?

The papers transmitted with your letter do not state the nature of the claim made by Mr. Grower, and we have been unable to get at any statement of it and are governed in making this reply simply by our general knowledge connected with this transaction.

The City entered into a contract with Mr. Grower by the terms of which the City was to construct caisson foundations for his new building on this lot, and this contract provided that it could be changed by agreement of the parties. Such engineering difficulties were encountered that it was found to be an absolute necessity that the contract be modified and the plans be changed, and we are informed that Mr. Grower would not consent to any change and would not consent to a construction of the foundations in the only manner that our engineers and the consulting engineers reported as practicable. This led to a long delay in the completion of the foundations, and we understand that a portion of his claim is for loss in time.

There is no doubt that the City is liable to the lot owner through whose premises it constructs a water tunnel without

first acquiring the right so to do. If it is the fact that Mr. Grower purchased this lot after the water tunnel was constructed, then the damage for which the City is liable will be very much less; but we take it that his claim is not for damage done by the construction or maintenance of the tunnel, but for the damage he suffered by reason of the delay of the construction of the foundations, which resulted in a loss of rents. If Mr. Grower should sue for this damage, the question would arise, how much of it did he cause by his refusal to enter into an agreement modifying the contract for the construction of the foundations, and it is uncertain what the result of the litigation would be. That he would recover some damages is more than likely. We think he would not be able to hold the City for the entire loss, for some of it was caused by his own act, but we are unable to give any idea of the approximate portion of the total damage that would be assessed against the City.

As to your second question, we are of the opinion that it is clearly within the legal right of the City to end this controversy by purchasing the property.

We return herewith the papers accompanying your letter.

Yours very truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Sale of Evaporated Milk Restored to Original Condition in Competition With Natural Milk.

May 14, 1906.

DR. C. J. WHALEN, Commissioner of Health, Chicago, Ill.

Dear Sir:

There has been handed to me a communication from Adolph Gehrman addressed to you, under date of January

8, 1906, with reference to the sale of milk which has been evaporated and then restored to its original condition by the addition of water, in competition with natural milk.

I am of the opinion that such milk cannot be sold in competition with natural and unchanged milk, except in violation of Section 1138 of the Revised Code, which provides that:

“No person or corporation shall manufacture, sell or offer for sale in the city, any condensed or evaporated milk for domestic use, unless the same shall be put up in packages or cans upon which shall be distinctly labeled or stamped the name or brand by whom or under which the same is made.”

The terms “condensed or evaporated milk” used in this section means milk from which the water has been taken by evaporation or some other process. The fact that the process of evaporating the milk does not change its chemical composition, does not make the milk anything different from evaporated milk.

If persons engaged in the business of handling condensed or evaporated milk could, by the addition of water, dilute such condensed or evaporated milk to the consistency of natural milk and sell the same in competition with natural milk, then the object for which Section 1138 of the Revised Code was enacted would be defeated.

Milk which has been condensed and evaporated and then again diluted is not natural milk, but diluted, condensed milk, and, before any person should be allowed to engage in the business of selling such milk, he should comply with Section 1138.

Respectfully submitted,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
MACLAY HOYNE,
Assistant Corporation Counsel.

**License Fee Required for the Privilege of Automobile
Occupying Public Hack and Cab Stands in
Addition to Regular Automobile
Operator's License.**

May 17, 1906.

JOHN E. TRAEGER, ESQ., City Collector.

Dear Sir:

Replying to your communication to this department, in which you inquire whether owners of automobiles which are kept for hire in a garage, and on which the license fee is paid by the keeper of the garage, must pay an additional license when they are kept on a cab or hack stand on the street, I beg to reply that in my opinion the City ordinances require such additional license fee.

Section 2377 of the code, as amended, requires a license fee of \$10 per annum from the keeper of a garage, and an additional \$15 for each automobile kept by him to be let out for hire or reward. This section, however, does not contemplate that such garage keeper shall, on the payment of such fee, become a common carrier or be entitled to the privileges of the hack stands created by ordinance.

The part of the code governing public automobiles to be used by common carriers for carrying passengers is Article II of Chapter LXIX. This article provides, among other things, that the owner of a vehicle used in this way must procure a license for this purpose, and the operator must also procure a special license in addition to the regular automobile operator's license; also that upon procuring such licenses he or they shall have the privilege of occupying public cab and hack stands, and shall be amenable to the provisions governing rates of fare, etc.

It will be observed that the distinction is very clearly drawn between the owner of a garage who lets the same for hire, and the common carrier who uses the cab and hack stands. If anyone desires to use an automobile for both purposes he must bring himself within the provisions gov-

erning each class of business, just as a livery stable keeper must do in the case of vehicles drawn by horses. In the absence of any provision in the code permitting the person who pays the license of a garage keeper to also act as a common carrier, such permission cannot be inferred merely because he pays a larger license fee than the latter.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Acting Corporation Counsel.

Whether Curbstone Flower Peddlers Are Violating the Ordinance Prohibiting Stands Upon the Sidewalks.

May 17, 1906.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

I am in receipt of your favor of the 17th inst., addressed to the Corporation Counsel, in which you request an opinion as to whether curbstome peddlers or other peddlers of flowers are violating the City ordinances. You also direct me to advise the Commissioner of Public Works in reference to the matter, so that he may act upon the recommendation of the Law Department.

Your communication was handed to me by a delegation from the Retail Florists' Association, and the substance of their grievance is as follows:

It appears that there are a number of persons who have placed showcases, or tables, or similar stands, on sidewalks in front of buildings where they display and sell flowers with the consent of the owners of the premises fronting upon such sidewalks. The association claims that they themselves are denied a like privilege, and their members have been compelled to remove showcases and similar structures from

the sidewalks whenever they have attempted to display or sell their wares.

Section 1924 of the Revised Municipal Code of Chicago of 1905 reads as follows :

“It shall be unlawful for any person or corporation to erect, place or maintain in or upon any street, alley, sidewalk, or other public place in the city any fruit stand, lunch stand, lunch wagon, flower stand, * * * or any table, box, bin, rack, showcase, platform, or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever.”

Section 1925 of the code imposes upon any person or corporation violating the foregoing provision a penalty of not less than \$2 nor more than \$100 for each offense, and makes each day that a showcase or other structure remains upon a street or sidewalk a separate and distinct offense.

Section 2083 of the code reads as follows :

“No person shall erect any booth or establish or fix any stand for the sale of fruit, books or other merchandise, or any article or thing of value whatever, encumbering any part or portion of the streets or sidewalks, under a penalty of not more than five dollars for each offense.”

It seems perfectly clear that under the foregoing provisions of the code, the sale or display of flowers in showcases or upon stands placed upon the sidewalks is illegal. The code is not only plain, but exceedingly comprehensive, and there is no occasion for any construction therefor.

As to the validity of the ordinance there can be no doubt. The Cities and Villages Act invests the municipal authorities of Chicago with the fullest and most complete control over the streets and alleys within its borders, and the City Council had a perfect right to exclude from the sidewalks, flower stands or other structures of a like nature.

I shall forward to the Commissioner of Public Works a copy of this letter as you suggest.

Very truly yours,

MACLAY HOYNE,

Acting Corporation Counsel.

Claim for Damages for Sinking of Land Due to Building of Water Tunnel, the Cause Being the Negligence of the Contractor, and the City Being Enjoined from Interfering.

Chicago, May 29, 1906.

HON. ALBERT H. BEILFUSS, Chairman of Sub-Committee of Finance Committee.

Dear Sir:

The attached communications having been submitted to me by you for an opinion concerning the merits thereof, including the said petition of Mr. Frank Rust, I respond to your request as follows:

Mr. Frank Rust owned the lot and building No. 736 North Washtenaw avenue, during the year 1898. Section 3 of the northwestern water tunnel was constructed under his lot about 100 feet below the surface of the ground and a trifle in the rear of his building then located on the lot. On the 11th of November, 1898, the contractors, Weir, McKechney & Co., who were in process of constructing the tunnel for the City, in pursuance of their contract of October 19, 1895, had progressed with the excavation to a point some forty feet beyond the petitioner's lot, the last sixty feet of such excavation not being bricked up at the time or finished into a completed tunnel; in fact, the last sixty feet consisted of only an excavation in the earth about thirty feet in diameter, and the superincumbent earth over the same being supported by timbers placed therein and resting upon the earth at the sides of the excavation. On this 11th day of November, 1898, while the excavation was in the condition mentioned, the said contractors filed a bill in equity in the Circuit Court of Cook County against the City, and procured thereon, on said day, an injunction against the City, restraining it and its officials and employes, from interfering in any way with the tunnel or any part thereof, or entering the same for any purpose whatever. Thereupon, on the same

day, the contractors abandoned the tunnel, took out their pumps, and allowed the tunnel, including the said sixty feet of excavation, to fill with water. The result of this almost criminal negligence on the part of the contractors, concerning which the City had no right to interfere, was, that the water softened the earth in the unbricked excavation, so that all of the supporting timbers therein were deprived of their footing and fell into the water. The support of the earth above being thus removed, it fell down to such an extent that the crust above became so weakened that it settled down, causing the surface above to become depressed at its lowest point or apex about six feet. A part of the foundations of two buildings were resting upon a portion of this depression, and the weight of which had partially produced the same. These two buildings settled upon one of their respective sides which rested upon the outer portion or rim of the depression, so that the two buildings ultimately rested, the one against the other. They were only a few feet apart. Of course the City was helpless in the premises, as it was restrained from doing anything by the existence of the restraining order of the court.

One of these buildings,—a two-story brick,—belonged to the petitioner Rust, and is the one referred to by him, and for the injury to which he seeks compensation.

The owners of these two buildings made no effort to preserve them or to minimize the injury, which they were bound to do under the law; so that in my opinion much of the damage to them resulted from the neglect of the owners. For such damage from negligence, of course, the City could not be liable. In my opinion, a little immediate attention by the owners, in the way of getting a building contractor to put some pack screws under the foundations of the buildings where the settling occurred, would have prevented any considerable injurious settling, and hence they would be now standing in about their original condition, save some few incidental repairs, costing perhaps a few hundred dollars for each building.

But the owners of these properties recklessly abandoned them to their fate, evidently expecting the City to pay the

full value or more for them, while they would be left to them so that they could rebuild upon the land again, as suited their pleasure. The petitioner Rust, when he found he could not get a large sum from the City in settlement, brought an action against it and when it was tried, he secured a verdict and judgment for some over \$4,000. An appeal was taken to the Appellate Court and the judgment reversed. One of the contentions of the City at the trial was, that it was not liable, for the reason that it was restrained by order of the Circuit Court in the said proceeding in equity, from interfering with the tunnel or the contractors in any way, and hence with its hands tied, it could not be, through inability, guilty of negligence, or liable for the acts of the contractors, any more than a babe could be guilty of negligence. The authorities and the law are with the City on the proposition, though the Appellate Court thought otherwise; but I am satisfied that if the question ever gets to the Supreme Court the City's contention will be sustained. Thus it is, and will be, until the Supreme Court passes on an appeal, an unsettled question.

Another of the City's contentions was, that it was liable for *only* a small part of the injury, and that the greater part of the damage had resulted from the plaintiff's (the petitioner's) own negligence, in refusing to protect the building. Upon the basis that if such was the fact,—concerning the plaintiff's negligence,—the Appellate Court agreed with the City, saying in its opinion:

“But it was plaintiff's duty to make such repairs as soon as it was reasonably possible to do so, and in the meantime to take reasonable measures to support his buildings and prevent injury thereto, and he cannot recover damages for injuries to his buildings and premises which could have been prevented had he made repairs as soon as it was reasonably possible to do so, and take proper measures to protect his buildings from injury in the meantime, so far as it was reasonably possible to do so.”

But the owners of these properties absolutely abandoned them, until they had arrived at such a condition of dilapida-

tion that last year,—seven years after the injury was suffered,—the City ordered the buildings torn down, and upon refusal by the owners to comply with the order, itself razed them to the ground. The property next to that of the petitioner was owned by one Jacobi, and cost approximately \$2,500. The City gave him in full settlement the sum of \$1,000.

At the time of the disaster to the property of the petitioner Rust, he had a mortgage upon it of about \$2,000 or \$2,500, which has not been paid, and I think the mortgagee has also sued the City. If anything is paid by the City in settlement for the injury to the Rust property, it should also include a release from the mortgagee to the end that the entire matter will be disposed of.

I am of the opinion that the petitioner's building cost probably \$4,500 to \$5,000 when it was built, and of course it had suffered some natural depreciation up to November, 1898, when the settlement took place, but to what extent I am unprepared to say.

I am pleased to give the foregoing information to the Finance Committee, through its sub-committee, leaving it to be determined by its good judgment what disposition will be made of the claim. I am of the opinion, however, that it would be wise to make an adjustment of some kind with the petitioner and his mortgagee. Beyond this I am unwilling to advise.

Respectfully submitted,

THOMAS J. SUTHERLAND,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Agreement Between City and West Park Commissioners re Part of Fines Collected for Violations of Park Ordinances to be Paid to City.

June 11, 1906.

L. E. GOSSELIN, Esq., Auditor.

Dear Sir:

Your favor of the 8th inst., enclosing a draft of a contract between the City of Chicago, and the West Park Commissioners relating to the custody of offenders arrested for violation of West Park ordinances, has been referred to me.

I return the same herewith, O. K.'d as to form, but have the following matters to suggest: I am advised that the West Park Commissioners are heavily indebted to the City of Chicago. The contract sent to me provides that the West Park Commissioners are to pay the City 50 per cent of all fines collected in compensation for the service rendered by the City. This implies that the West Park Commissioners are to receive all the money from the justices, and then settle with the City. In view of the fact that the Commissioners are indebted to the City, it would be good business policy to turn this around, and have the contract provide that the City is to pay to the West Park Commissioners one-half of all the fines collected by the justices, the justices in the first place being instructed and directed to pay all the fines to the City. By this means the City would, of course, get some funds in its hands to set off against the indebtedness of the West Park Commissioners to it.

If these suggestions will meet with your approval, kindly return the contract to me, and I will make a new draft incorporating the above matter.

Yours respectfully,

LEE D. MATHIAS,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

Sale of Beer From Wagons.

June 28, 1906.

HON. JOHN M. COLLINS, General Superintendent of Police.

Dear Sir:

I have your request of recent date for an opinion as to the legal right of your department to arrest peddlers found selling bottled beer and liquors on the streets and at private residences, or who in any way solicit custom without having the order for the delivery of the same.

Section 1355 of the Revised Code of City of Chicago provides:

“LICENSE—DEFINITION—APPLICATION—BOND.) No person or corporation shall carry on the business of a brewer or distiller, within the city without having first obtained a license for such business, as hereinafter provided, for each brewery and each distillery conducted by such person or corporation. Any person or corporation desiring to carry on the business of brewer or distiller in the city shall file with the mayor an application containing the full name of the applicant, the business proposed to be carried on, and whether such business will include brewing or distilling within the city, or only disposing within the city of liquors brewed or distilled by the applicant elsewhere, the location of the place or places of business of the applicant, including the location of the brewery or distillery whose product is to be disposed of in the city under the license, and the name of each and every agent within the city representing any such applicant whose business may be carried on in the city through an agency. A separate application shall be made in respect to each brewery or distillery wherever located. The applicant shall file with the application in the office of the city collector a bond in the sum of one thousand dollars, with good and sufficient sureties to be approved by the city collector, and conditioned to comply with the provisions of this article.”

And Section 1357 of the code provides:

“VEHICLES MARKED.) No malt liquors shall be sold or delivered from any wagon or other vehicle used or operated by any brewer or distiller licensed hereunder

unless that shall be painted on each side of such vehicle in a conspicuous place, and in legible letters not less than five inches in height, the name of such licensee, the location by street and number of the place of business of such licensee, and the number of the license held by such licensee."

These sections of the code govern the selling of malt liquors in retail quantities. A careful examination thereof will demonstrate that the only person who can deliver such liquors in retail quantities from wagons is a person licensed to carry on the business of a brewer or distiller. There is no authority to be found in the ordinance either for the selling of malt liquors from wagons or for soliciting orders for such sale; therefore to indulge in such would be to violate the ordinance for which violation the code in Section 1358 provides the following:

"PENALTY.) Any person or corporation violating any of the provisions of this article shall be fined not less than one hundred dollars nor more than two hundred dollars for each offense, and a separate offense shall be regarded as committed each day on which such person or corporation shall violate any of the provisions of this article."

It must be confessed the ordinance is not clear in its definition of the rights of a person to *sell* beer or malt liquors from wagons.

I am of the opinion, however, that the *only* authority therein *clearly* conferred is that which authorizes the *delivery* of such liquors at private dwellings. This does not justify the *sale* of, or the soliciting of orders for the delivery of, such liquors from wagons.

I have not considered in this opinion the provisions of the code governing the sale of malt liquors in wholesale quantities, because I do not take it that you request an opinion relative thereto.

Yours truly,

EDWARD T. WADE,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Assistant Corporation Counsel.

Request to U. S. District Attorney and Marshal to Stop Gambling in Boats on Lake Michigan.

June 28, 1906.

TO THE HONORABLE UNITED STATES DISTRICT ATTORNEY, AND
UNITED STATES MARSHAL, FOR THE NORTHERN DIVISION
OF THE STATE OF ILLINOIS.

Gentlemen:

I have the honor to advise you that a reputable number of the police force have, after obtaining reliable evidence, brought to my attention officially, that which I now inform you, to wit:

That a certain boat known as the ship "Traverse" is plying the waters of Lake Michigan, within the District of the State of Illinois, and within the jurisdiction of the United States, particularly in the harbors of the City of Chicago and in the public waters of Lake Michigan, within the District of the State of Illinois, and within the admiralty and maritime jurisdiction of the Northern Division of the State of Illinois, carrying on the business of a gambling boat, and conducting a general gambling establishment, consisting of betting upon pools and races, speculating by gambling upon events of different sporting character.

You are notified and by me informed that the boat puts out from the City of Chicago, and the harbors of the said City laden with passengers who take passage for the sole and single purpose of participating in the betting and gambling designs, objects and occupation of the said boat. That the said boat has no other business, occupation or purpose. The said passengers subsequently, upon return of the boat in the waters of Lake Michigan, landing in the City of Chicago at the harbor of the City of Chicago, and coming from the said boat, to the utter demoralization of the business interests and public morals of the different harbors and localities in the City of Chicago, from whence the said boat departs, and to which the said boat and passengers return.

I am advised by the law authorities of the City of Chicago and the County of Cook, that I have no police jurisdiction beyond the three mile limit in the waters of Lake Michigan. That so long as the passengers of the said boat commit no act in the violation of the State or City laws within the said three mile limit, or the harbor area, the police department has no jurisdiction to apprehend the persons. Nevertheless, I am also advised, that if the ship is conducting itself through its officers in the manner herein set forth, that such is a public nuisance to the laws of commerce and to the shipping ranks, as the ordinary ship of a pirate, and that it is within the power of the United States through its authorities, to apprehend the ship by libel, looking to condemning the ship as a nuisance and as a violator of the peace and morals of the sea, and to revoke all licenses or permissions granted by the Government to such ship, when the same have been granted under the ostensible purpose for the carrying of commerce and passengers.

I have the honor to respectfully request, that you and each of you, will use your official offices to the extent of your power, and take the necessary steps to the banishing from the waters of Lake Michigan the ship "Traverse," and apprehending the public nuisance to commerce, and thus further avoid the demoralizing effect upon the citizens of Chicago, by the constant presence to and fro, of the ship engaged in the open criminal design, and in the vicious occupation in which the ship and her crew is engaged, contrary to the public morals of this country.

I beg to tender the services of the Police Department, and such testimony and all of the same, which is in my possession and control, in order to aid you to accomplish the purpose I herein respectfully invite.

I have the honor to be,

Respectfully,

JAMES HAMILTON LEWIS,

Corporation Counsel.

Construction of Building Ordinance Relative to Alteration of Frame Buildings in Fire Limits.

June 28, 1906.

HON. PETER BARTZEN, Commissioner of Buildings.

Dear Sir:

Your letter of the 27th inst., in which you ask for an interpretation of Section 643 of the Revised Municipal Code, was referred to me for an opinion.

Said section reads as follows:

“No existing frame building inside the fire limits shall be altered or enlarged beyond the limit or height and dimensions described in Sections 642 and 646 of this chapter.”

It is evident that the number 646 in the above section is a misprint. The section limiting the dimensions of frame buildings is number 647, and it is the dimensions described therein that are referred to in Section 643.

Section 640 gives authority for the alteration and enlargement of frame buildings, but refers only to such buildings outside of the fire limits. Section 642 prohibits the erection of frame buildings within the fire limits except where express provision is made therefor. Section 651, which provides for frame sheds of not to exceed 300 feet in area within the fire limits, has a provision which inhibits the use of same as an addition to a dwelling house.

Section 644 provides for altering frame buildings within the fire limits into flats, but does not provide for enlargement. Section 645 provides for raising such buildings within the fire limits, also for changing slanting roofs to flat roofs and for raising walls incident to such change, but expressly provides that after the change is made the cubic contents of the reconstructed building shall not be greater than before.

By construing together all of the sections above referred to (with the exception of the one you ask to have interpreted)

it seems quite plain that it was the intention of the City Council strictly to limit the size of frame buildings within the fire limits to their original size in case of alteration. But if so literal a construction is applied to those sections, then Section 643 would be utterly meaningless.

It is a well established rule of construction that ordinances must be construed so as to give full effect to all the words used. The same is true of clauses and sections. In other words, it must be assumed that Section 643 expresses some legislative intent. Inasmuch as it speaks of the enlargement of frame buildings within the fire limits, I would interpret it to mean that in case some structural change is made on a building of a character that is not an addition, the same may be permitted.

Such alterations as the construction of a bay window, a storm shed, a dome, tower, cupola, or other ornamental structure, to my mind, is not such an addition to a building as is forbidden by the code, except in so far as the construction of same would result in increasing the dimensions or height of the building beyond the limits prescribed in Sections 642 and 647.

I would therefore interpret Section 643 to mean that where a frame building is altered by the construction of such auxiliary or ornamental structures as I have referred to, care must be exercised that such alteration does not increase the size of the building beyond the prescribed limits—the line should also be strictly drawn between an alteration of this character and an addition to the building. To illustrate: Contractors would have no right, under the pretense of constructing a bay window or a tower, to build a room adjoining a building or add a partial story to same. While in some cases, it may be difficult to draw the distinction, I believe that ordinarily the line of demarkation is where such a structure would constitute an additional room, in which event it would clearly be unlawful.

Such an interpretation would not only give effect to Section 643, but would do away with what might in many cases

be regarded as an unreasonable construction of the other sections mentioned.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
WM. D. BARGE,
Assistant Corporation Counsel.

**Power of City to Arrest Owners of Boats Keeping Slot
Machines and to Procure Search Warrants for
Seizure of Gambling Implements.**

June 29, 1906.

HON. JOHN M. COLLINS, General Superintendent of Police.

Dear Sir:

Replying to your request of recent date concerning the complaint made to Capt. P. J. Gibbons of slot machines on certain boats running out of the harbor of the City, I beg to advise you that under the Slot Machine Act of 1895, you have ample power to proceed.

Sections 2 and 3 of said act are as follows:

“Sec. 2. Every clock, tape machine, slot machine, or other machine, or device for the reception of money on chance, or upon the action of which money is staked, hazarded, bet, won or lost, is hereby declared a gambling device, and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found.

“Sec. 3. Every owner, occupant, lessee, mortgagee or other person in possession of any premises upon which any gambling device may be located, and every person in the use, operation, lease or other possession of the same, shall be fined for the first offense not less than one hundred (100) dollars, and for the second offense shall be fined not less than five hundred (500) dollars and shall be confined in the county jail not less than six (6) months, and for the third offense shall be fined not less than five hundred (500) dollars and shall be imprisoned

in the penitentiary not less than two (2) years nor more than four (4) years.”

This act has been before the Supreme Court of the State for interpretation and its constitutionality was passed on in the case of *Bobel v. The People*, 173 Ill. 19.

The court held the act constitutional, and said, among other things.

“While a plausible argument is made that in view of the phraseology of the statute, and especially of the title, the purpose of the act is not to prohibit the mere keeping or using of such a device, but only the keeping or owning of the same to be used for gambling purposes, still, it cannot be doubted that the legislature has the power to prohibit the mere keeping in possession of such gambling devices as well as to prohibit their use. * * * And we are of the opinion that it was the purpose of the legislature in enacting this statute, not only to suppress the use of these gambling devices or the keeping of them for gambling purposes, but also to prohibit the ownership or the keeping of them whether for gambling purposes or not,—otherwise, why make it a criminal offense to own or keep them, without qualification as to the purpose of such ownership or keeping, and why provide for their seizure and destruction? * * * They are declared to be gambling devices, and their manufacture might be prohibited and their ownership as property also prohibited. If, as the statute provides, the mere ownership of such devices is a criminal offense, no reason is perceived why the mere keeping of them is not also made an offense. The purpose of the statute seems to be not only to prohibit the mere use, but to suppress such devices altogether by the means provided by the statute, even by destroying them.”

The proper method of procedure is to procure a state warrant for the arrest of the owner or person in charge of the boat for keeping a slot machine, and a search warrant for gambling implements may also be procured and the machines seized.

The Supreme Court held in the case of *Frost v. The People*, 193 Ill. 640, that in spite of the fact that the Search Warrant Act was passed prior to the enactment of the Slot

Machine Act, and that the wording of the same seems to indicate that it contemplates the seizure of gambling implements only when used in a gambling house or place resorted to for unlawful gaming, still such a procedure as I have outlined herein is proper.

Under the authorities above quoted, I am of the opinion that you have ample power to proceed and that the courts would sustain your action. It should be borne in mind, however, that the jurisdiction of your department extends to the state line only, and action should be taken within that.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Assistant Corporation Counsel.

Payment of Interest on Past Due Interest Coupons on Special Assessment Bonds.

July 12, 1906.

HON. L. E. MCGANN, Comptroller.

Dear Sir:

I am in receipt of your request of the 11th inst. for an opinion as to whether the City is obliged to pay interest on past due interest coupons; and I am informed verbally that the coupons in question are payable out of a special assessment fund.

Section 86 of the Local Improvement Act provides for the issuance of such bonds and the rate of interest to be paid, and also provides the form of the bond. Section 44 of the Revised Code provides the form of the coupon to be attached to such bonds.

The above Section 86 is in part as follows:

“For the purpose of anticipating the collection of the second and succeeding installments, * * * it shall be lawful for such city * * * to issue bonds, payable

out of said installments, bearing interest at the rate of five per centum per annum, payable annually * * * ; said bonds * * * shall be dated and draw interest from the date of the issuing of the same. * * *''

As there is no express agreement on the part of the City, either in the bond or the coupon, to pay such interest, and as the statute does not place this obligation upon the City, I am of the opinion that the City is not obliged to pay such interest.

Town of Mt. Morris v. Williams, 38 Ill. App. 40.

Yours truly,

MICHAEL F. SULLIVAN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

Notarial Fees Collected by City Employes When Not Acting in an Official Capacity.

July 20, 1906.

DR. CHAS. J. WHALEN, Commissioner of Health.

Dear Sir:

The letter of the auditor concerning the notarial fees collected by Mr. Wilson O. Stahl and Mr. Daniel Appleton was referred to me for attention. I had occasion sometime ago to write to His Honor, the Mayor, concerning the precise question raised by this communication of the auditor. I see no reason for changing an opinion which I expressed at that time.

I am unable to find anything in the code now in force which prohibits a city employe from collecting notarial fees when he acts otherwise than in his official capacity. It seems that Mr. Stahl administered oaths to persons who filed bonds as scavengers in the Department of Health. It is not made a part of his duty to administer such oath, and many of

these bonds are sworn to before notaries who are in no way connected with the City. Practically the same condition exists in regard to Mr. Appleton, who is a clerk in the laboratory and sometimes administers the oath or takes an acknowledgment on the bonds of icemen.

The law is very plain with regard to fees collected for *ex-officio* services. The act relating to municipal officers of Chicago passed by the last legislature has the following clause:

“No officer shall be allowed any fees, perquisites or emoluments, or any reward or compensation aside from his salary, but all fees and earnings of his office or department shall be paid by him into the City Treasury.”

Section 1517 of the code also provides that:

“Any city officer upon whom the duty devolves is hereby authorized to demand and receive as fees for the use of the city, etc.”

My construction of the statute and the ordinance is that, wherever the law requires that an oath should be administered by a City employe, he is bound to account for the notarial fee, if the ordinance requires such a fee, but, if a person files a document which he may swear to before any notary, the City employe who acts as a notary is in the same position as a private person acting in that capacity.

Without giving any opinion on the propriety of demanding a notarial fee where an oath is administered by a City employe, I am therefore of the opinion that the City has no right to demand such fees if they are collected in the manner I have indicated.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,

Assistant Corporation Counsel.

License Required of Persons Keeping Automobiles For Hire.

July 26, 1906.

L. E. GOSSELIN, Esq., Auditor.

Dear Sir :

Your letter of recent date, in which you asked for an interpretation of Paragraph 2377c of the Revised Code which appears on page 2758 of Council Proceedings for 1905-6, was referred to me for reply. Said paragraph reads as follows:

“(License Fee.) For all garages where vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping, the license fee shall be ten dollars per annum, and in all cases where vehicles are kept to be let out for hire, or reward, there shall be an additional license fee of fifteen dollars per annum to be charged the keeper for each automobile kept which is to be so let for hire.”

It seems quite clear that it was the intention of the Council to require the ten dollars fee from establishments conducted for the purpose of renting automobiles as well as those which keep and store same for other parties. Applying the well known rule of construction that a statute or ordinance must be interpreted so as to give full meaning and effect to all the words used therein, we find that the words “in all cases” and the word “additional” which appear in said section admit of no other interpretation.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved :

MACLAY HOYNE,

Assistant Corporation Counsel.

Interpretation of Garage Ordinance Relative to Frontage Consents.

August 27, 1906.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir :

I am in receipt of your favor of the 27th inst., addressed to the Corporation Counsel in which you requested some member of the law department to accompany Messrs. G. Fred Rush and David S. Geer, to examine the block in which the building numbered 314 East 57th street is located, in order that it might be determined whether the license issued for a garage at that building is valid under the City ordinances.

I have just had a conference with Messrs. Rush and Geer and it developed that there was no necessity for visiting the premises in question, as they both agreed that the facts as stated in the communication of Andrew F. Hughes, Acting Commissioner of Buildings addressed to the General Superintendent of Police bearing date of the 17th inst., were correct.

Section 223 (77a) of Article VI of Chapter LXIX of the Revised Municipal Code of Chicago of 1905 as amended by an ordinance passed March 12, 1906 (Council Proceedings March 12, 1906, page 2904), provides that no license shall be issued to operate a garage within the City, "in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, * * * without the written consent of a majority of the property owners according to frontage, on both sides of such street."

The same section contains the proviso which reads in part as follows:

"Provided, that in determining whether two-thirds of the buildings on both sides of such street are used exclusively for residence purposes, any building fronting upon another street and located upon a corner lot, shall not be considered."

It appears from the letter of Acting Commissioner Hughes before referred to, relating to the application for a garage license at No. 314 East 57th street, that the property located at the northwest corner of that street and Washington avenue faces on *Washington avenue*, and the Commissioner concluded that therefore this property should be eliminated from the calculation as to what constituted a majority of the frontage, and that therefore the applicants for a license had a majority of the frontage.

It is contended by Geer that Acting Commissioner Hughes is correct, and he relies on the proviso above quoted, claiming that said proviso relates not merely to the method of determining what is a residence block, but also relates to the amount of frontage.

I am unable to agree with the contention of Mr. Geer. It seems to me that under the section of the ordinance above set forth, there are two questions:

First, Are two-thirds of the buildings in the block in question devoted exclusively to residence purposes?

Second, If that is so, has the applicant or applicants the consent of a majority of the property owners according to frontage on both sides of such street?

The proviso, it seems to me, relates only to the first question, and has nothing whatever to do with the second. The property at the northwest corner of 57th street and Washington avenue should be included when counting the total amount of frontage on 57th street, and therefore the applicant has not the consent of a majority of the property owners, according to frontage.

I return herewith the correspondence and papers relating to this matter which were forwarded to this office.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

**Chicago & Oak Park Elevated R. R. Co. Required to
Pay One-third Annual Maintenance of
Lake Street Bridge.**

October 5, 1906.

THOS. G. PIHLFELDT, City Bridge Engineer.

Dear Sir:

I return herewith letter addressed to you by Mr. E. C. Noe, General Superintendent of the Chicago & Oak Park Elevated R. R. Co., relative to the attached bill for maintenance and operation of the Lake street bridge during the year ending December 31, 1905.

You ask for an opinion as to whether or not Mr. Noe's interpretation of the ordinance of November 24, 1890, is correct.

It is my opinion that Mr. Noe is mistaken. The ordinance specifically requires this company to pay "one-third the annual maintenance" of the bridge, and it is a self-evident proposition that the bridge cannot be maintained unless it is protected by piling. Neither can it be maintained unless the approaches and foundations are kept in such condition that the public can use the bridge.

If it is the fact that bills for similar charges have been rendered against this company and paid by it without question in the past, it is very likely the court would hold that the company is now estopped from taking its present position.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Enforcement of Collection of Taxes.

October 20, 1906.

HON. JOHN J. HANBERG, County Collector.

Dear Sir:

I have the honor to address you upon a matter of your official duties regarding the collection of taxes.

I take the great liberty to present to you the offer of the co-operation of this office, and now inform you that it has been brought to my attention that—notwithstanding the efforts of this office, aided by the decisions of the courts and of the Board of Review following the courts, to enforce the collection of taxes due the City, which amount to the sum of \$2,193,488.00 that should now be paid into the treasury of the City of Chicago for the City's uses—the concerns against whom judgments have been rendered are refusing to pay you, and that they threaten to continue to refuse; that in this way they are not only resisting the judgment of the courts and of the Board holding them liable for, and guilty of refusing to pay, the tax that the law has now exacted, but threaten through lawsuits to defeat the City altogether.

I now take the liberty to advise you that the particular concerns whose liabilities to the City are now adjudicated consist, in some instances, of railroad companies whose properties run in and out of this City to different parts of the country and upon which tax has now been laid by the decision of the tax court of Illinois. I am informed that this tax is to be ignored. I advise you that under the law the assessment becomes a *prima facie* judgment. With your authority, the City, co-operating with you through all of its offices, will attach the cars and the property of any of these companies at the immediate time you report that they refuse to pay this tax. I advise you that the City, under these conditions, acting for itself in conjunction with the county, proceeds without giving bonds.

Other concerns whose taxes were increased, based upon many millions of dollars of bonds and stock heretofore undisclosed, now contest the same and decline to pay the taxes assessed. Upon notice by you to me of the refusal of such as these to pay these taxes, their property within this county can be seized, by a form of execution, at once, and without any further court proceedings.

I also advise you that certain large estates, which have for years escaped taxation and until the late judgments of the court and of the Board of Review laid assessments upon them—can now be made to pay, notwithstanding their attempt to avoid the same. This can be done summarily by an order upon the Probate Court, who will order the officer in charge of the estate to pay the taxes under penalty of contempt of court. And in instances where the estate has been distributed the distributees can be made to respond by similar summary process upon the theory that in cheating the County and City of taxes they have been guilty of contempt of court (the assumption being the court would have ordered these taxes paid had the truth not been disguised and the money drawn by the distributees by imposition).

I have the honor to advise you that certain trustees and institutions holding the property of these certain estates indebted to the City and County can summarily be held to turn over the property in their hands to respond to these taxes.

I am able to advise you that the position of the City and County respecting the collection of these taxes is different from that of the ordinary creditor. The defendants herein referred to, by giving a bond, may appeal, but cannot avoid the payment of the taxes. After action is taken such as I suggest here in my letter, resort to the courts may be had by the tax debtors, it is true, *but in such event the tax must first be paid*, then litigation may proceed to recover back the money. In the meantime the City may use the full sum for its needs for school houses, streets and police, and the County for its uses, and should a final judgment be against the County or the City for any sum of excess, the money then may be paid back in the amount of that excess out of

the general funds then in existence. You see by this method we will have the benefit of the money while the defrauding tax debtor is, by groundless lawsuits, trying to cheat the people out of what belongs to them.

I have the honor to tender you at once my services to co-operate with any officer whom you may select as your legal adviser, or representative, of the County,—as I have the pleasure now to inform you that the time for action against the Board of Review on the part of any who complain of the assessment made has now expired. I trust I may have the pleasure to have your directions, that I may aid you in the worthy undertaking upon which you have entered to collect this money due the people.

I have the honor to be,

Very respectfully,

JAMES HAMILTON LEWIS,

Corporation Counsel.

Construction of Garage Ordinance Relative to Frontage Consents.

October 25, 1906.

ANDREW F. HUGHES, Esq., Deputy Commissioner of Buildings.
Dear Sir:

You have requested this department for an opinion construing the ordinance of March 12, 1906 (Council Proceedings, p. 2904), amending Section 2377a of the Revised Municipal Code of 1905, relating to the keeping of garages, and you desire this department to express an opinion upon the question whether the written consent required is that of a majority of the property owners according to frontage on both sides of the street, or according to frontage on each side of the street.

The particular case in point was that of an application for a permit to construct a garage on the rear of the premises known as 5426 Kimbark avenue. We are informed that

a majority of the property owners according to frontage on both sides of the street have consented to this garage. We are of the opinion that if the applicant presents a majority of the property owners according to frontage on one side of the street, but less than a majority upon the other side, and the majority so presented is sufficient to give him a majority of the total of the two sides of the street, that is a sufficient compliance with the ordinance. The ordinance is not clear, and we cannot deprive one of the use of his property unless the language is clear and specific.

We are of the opinion that in this particular case the applicant has the requisite consents.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Operation of North Shore Electric Co. Without Authority From City.

November 15, 1906.

HON. WM. L. O'CONNELL, Commissioner of Public Works.

Dear Sir:

About a year ago I was asked to give an opinion concerning the right of the North Shore Electric Co. to continue to operate in the territory formerly within the corporate limits of Norwood Park, but now within the territorial limits of Chicago. The question came up on an application made for installing poles on the south side of the alley north of East Circle avenue, Norwood Park.

I advised the City Electrician against issuing such permit because the said company had forfeited all its rights and privileges under the ordinance granted to Butler Lowry by the Village of Norwood Park on November 6, 1893. Shortly after rendering this opinion I was advised by the City Electrician that His Honor, Mayor Dunne, desired to have the necessary legal steps taken to formally revoke the rights of

this company, and in pursuance of said instructions I notified the company that their rights and privileges had been forfeited. This notice was given to said company on April 9, 1906.

In response to my notice I was visited by Mr. Frank J. Baker, Vice-President of said company, who did not deny that the said company was operating without authority in the district formerly within the limits of Norwood Park. He represented, however, that the discontinuance of the service would work a hardship upon the people in that neighborhood, who would be unable to secure service from any other company. On account of such representations I stated to him that I would hold off the matter long enough to enable his company, if it saw fit, to secure a proper ordinance from the City Council. A long time has elapsed and so far as I can learn no steps have been taken by this company looking towards the procuring of an ordinance authorizing them to do what they are now unlawfully doing.

I have moreover been informed within the last few days by the City Electrician that the apparatus of this company is in an extremely dangerous condition, and that it ought to be removed or repaired at once.

There is a strong likelihood of liability being placed upon the City, or at least, of a claim of this kind, in case an accident should result from the dangerous conditions described by the City Electrician.

In view of the instructions of the Mayor and the negotiations with the company, I therefore deem it advisable to inform you of these conditions, and to further advise you that it is within your power, under the City ordinances, to cause the removal of the poles and wires of this company which now obstruct the streets.

I have this day written to the North Shore Electric Co. informing them that I have so advised you, and stating further that I have recommended that a peremptory notice be given by you requiring them to remove their poles and wires within a short day to be fixed by you. I think it would be well to at once serve such notice in order that the matter

may be finally disposed of, and in case the notice is not observed, that such poles and wires should be removed. The City Electrician informs me that even though the people of that neighborhood should be deprived of electric light on account of such action, there is sufficient surplus electricity available from City lighting plants to supply that neighborhood if necessary.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Lighting of Street Intersections Beneath Elevated Structures.

December 3, 1906.

TO THE HONORABLE, THE CITY COUNCIL, OF THE CITY OF CHICAGO.

Gentlemen:

At the last regular meeting of your Honorable Body you passed an order which is published at page 2093 of the current printed Council Proceedings, reciting that the South Side Elevated Railroad Company has been frequently requested by aldermen and citizens to light the streets at street intersections beneath its structure by electricity, and that such requests have been ignored.

This order directs the Corporation Counsel to furnish an opinion as to the right of the City, under its police powers, to compel the South Side Elevated Railroad Company to light the street intersections beneath its structure, and to suggest to the Council the proper method of enforcing such right if it exists, etc.

Section 1997 of the Revised Municipal Code of Chicago of 1905 reads as follows:

“Any person or corporation owning or operating any steam, elevated or street railway, whose track or tracks cross or intersect at above or below grade any of the streets within the City shall and they are hereby required to provide, at their own expense, proper and sufficient lights and care for same at all such crossings or intersections. Such light shall be of such kind as may be approved by the Commissioner of Public Works.”

Section 1998 of the code provides that any person or corporation violating the foregoing section shall be fined not less than \$10.00 nor more than \$100.00 for each offense, and that each day during which any crossing or intersection is permitted to remain without light after the first conviction shall constitute a separate and distinct offense.

This legislation, it seems to me, is of the same general character as statutes or ordinances requiring the construction of approaches, embankments, cattle guards, bridges or gates, and is authorized under the police power of the City. Such legislation, it seems to me, is particularly reasonable in the case of an elevated railroad, because where an elevated railroad structure crosses a street it has the effect of making the street below it much darker than the remainder of the street. The elevated railroad companies then, themselves, are, at least, in part the cause of the darkness of streets below their structures.

In the *City of Chicago v. Chicago Union Traction Company*, 199 Ill. 259, the court passed upon an ordinance of this City which required a street railroad company to clean between its rails all streets occupied by the company, and which imposed a penalty for violation of the ordinance, and it appears that owing to the presence of the tracks, the street, instead of sloping from the center, had a flat crown 16 feet in width, and that the rails retained dirt in the center of the streets, and that owing to such conditions it was more difficult and expensive to clean the streets. The ordinance was upheld and it was denied that it cast a public burden upon the street railway company.

It is well known that the darkened places between elevated railroad structures have been frequently used by thugs

as hiding places while laying in wait for citizens passing along the street.

It may be that Section 1997 is not sufficiently specific to render its provisions enforceable in mandamus proceedings, but I believe that the section is valid, and that the penalty imposed in the succeeding section may be enforced. I would suggest that prosecutions for violations of the ordinance furnish the most efficacious means for compelling the companies to install lights at street intersections. I do not believe that because the Commissioner of Public Works is entrusted with the power to select the kind of light to be used the ordinance is invalid.

Spiegler et al. v. City of Chicago, 216 Ill. 114.

Very truly yours,

MACLAY HOYNE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Right of Lake St. Elevated Railway to Store Cars on Its Tracks.

December 6, 1906.

HON. JOHN M. COLLINS, General Superintendent of Police.

Dear Sir:

Your communication of the 3d inst. to this department, enclosing report of Lieutenant Williams and statements of Francis Leon, has been referred to me.

The ordinance under which the Lake Street Elevated Railway was built and is operated authorizes the company to construct, maintain and operate two railroad tracks with such sidetracks, turnouts, switches, telegraph, telephone and signal service as may become necessary or proper.

This grant does not confer upon the company the right to use any of its tracks, sidetracks, switches or turnouts for the purpose of storing thereon any cars of the company.

If any of the tracks are utilized for that purpose, the use is one that is neither contemplated nor justified by the ordinance.

I would suggest that you request the company to discontinue the use of its tracks as a storage place for its cars.

Yours truly,
W. W. DeARMOND,
Assistant Corporation Counsel.

Approved:

MACLAY HOYNE,
Assistant Corporation Counsel.

Adjustment of Tax Claims Against the Illinois Tunnel Co. and the Pullman Co.

December 10, 1906.

TO THE HONORABLE THE FINANCE COMMITTEE.

Dear Gentlemen:

I have the honor to advise you of the movement of the proceedings in the matter which I in part communicated to your honorable chairman some time past.

You may recall that there has in the past been considerable litigation, at my instance, against the Illinois Tunnel Company, attacking the assessment upon the ground that the same was too low, etc. At that time the assessment was \$500,000.00, with \$250,000.00 added for personal property, or \$750,000.00; I demanded \$5,000,000.00; the company insisted on the original assessment. From step to step we have gone through the courts, the City being defeated in all of the lower tribunals—the County Assessors, Board of Review, Circuit Court—but concluding in a final victory for the City before the Supreme Court of the State, which reversed all of the lower tribunals; the court in nowise deciding, however, what the assessment should be, but sustaining the legal views of the City as to what kind of law should guide the same and under what doctrine the same should be adjusted. Finally,

when I was on the eve of reinstating a general bill in equity, or general investigation by an equity court, and after having served notice of the same, I concluded to fight the subject out before the Board of Review, based upon the decision herein referred to by the court, with the result that the City secure an assessment upon the basis of \$3,000,000.00. Propositions have for the last month being going to and fro looking to concluding the litigation, your Corporation Counsel being anxious to have the money in the treasury and to avoid prolonged litigation, while the company's office expressed a similar desire. However, from one proposition to another, the culmination was as follows:

That the assessment of the Board of Review of \$3,000,000.00 remains; that the company withdraw its attempt to have the same based at \$750,000.00 upon the theory that the tunnel was merely a part of the street and therefore—even under the decision obtained by me as to the basis of taxation generally—was exempt because the street itself would have been exempt; also, that whatever sum should be paid, should be paid promptly; and, I beg to add, I made a further condition—that all expenses for expert fees, special attorney fees and all court costs heretofore incurred by the City in litigation represented by me or under my direction should be paid by the Tunnel Company, so that the City should not only have the benefit of the increased taxes, but all of its expenditures returned to the last cent. I gave the representatives of the Tunnel Company the items of the expense.

Upon something of a final consultation today, I have authorized that these matters, should they be accepted, be brought to your Honorable Finance Committee either for the acceptance of these propositions or, if the assessment is to be treated by them as a matter for the County, that the sums be paid to the County Treasurer (which is the usual course), but that the expense of the litigation which was conducted by the City be returned back to the coffers of the City, cent for cent. I have taken the liberty to suggest that the checks be made either to the Chairman of the Finance Committee or to the Honorable Comptroller. This is the information upon that subject.

I beg to advise your committee that finally I had a conference, on Sunday, with Mr. J. F. Runnels, Vice-President and General Counsel of the Pullman Company, which conference was at the Chicago Club, the object being to reach a basis of settlement by which a certain capital stock assessment should be acknowledged and immediately paid. My propositions were rejected by Mr. Runnels, he declining to accept them. His propositions were rejected by me, they not being what I deem to be the best interests of the City. However, as the fight is to continue before the Board of Equalization, and possibly elsewhere, I left a final proposition which included the suggestion that if the figures I was willing to accept as a basis should be adopted and met the approval of the County—in view of the doubt prevailing in different parts of the United States of America, wherein it is held that the capital stock of a company and property of a company going through many states, if taxable in those states, should be exempt from taxation in the state of the home office—and after conference which the company's counsel is to hold with the representatives of the company, all expenses of the City should be paid in the litigation initiated by me for experts and for counselors who had been engaged by me in other states of the Union, in order to reach the truth which I was unable to establish, to-wit: that though the property was taxable through these states, nevertheless no taxes had been *put upon* the same (disclosing such through the official records of many states), which expenditures resulted in what I felt was an enforced decision from the Board of Review under the ruling of the court obtained, taxing all of the cars of the company at this point, upon the basis that this was the residence of the cars, notwithstanding the cars may be in several states of the Union, from the Atlantic to the Pacific.

This is merely to inform you that I authorize the representatives of the Pullman Company, should the propositions under consideration finally be accepted by them, to pay these expenses to your honorable committee, returning my propositions to your committee for approval or presenting the

same to the Comptroller, who doubtless will present them to your committee for approval.

I beg to say that I am kindly aided by the counsel of the Comptroller, who agrees with me that this matter should be brought to your honorable committee as often as it arises, with complete explanation, and that is why I am burdening you at this time with this preliminary but what I regard necessary communication.

I have the honor to be,

Very obediently,

JAMES HAMILTON LEWIS,

Corporation Counsel.

Status of Lake Avenue.

December 14, 1906.

HON. THOMAS J. PIELFELDT, City Bridge Engineer.

Dear Sir:

Replying to the letter of inquiry addressed by Ricard O' S. Burke, Harbor Engineer, to the Corporation Counsel, I have the honor to report that an investigation of the questions asked therein have led me to the following conclusions:

First. Relative to your inquiry as to the character of Lake avenue, I answer that it is a public highway 150 feet in width along its entire length. You note in your communication that an attempt was made to vacate Lake avenue, and I find that after that attempt was made the purported proprietors undertook to deed to the City a strip of ground 80 feet wide for a street to be known as Lake avenue.

The denial of the right to take any of those proceedings on the part of the City led to a suit in the Circuit Court which was designated as *Westfall v. Hetherington et al.*, and numbered Burnt Record 992. In this suit all the questions relative to the attempted vacation and re-transfer were brought before the court and litigated. The suit lasted for

more than six years, but a final decree was entered by Judge Mack on May 29, 1905, finding all the material issues in favor of the City. In its decree the court specifically found that, in 1868, Westfall made a subdivision of the land he then owned, by a statutory plat, by which he dedicated a street called Lake avenue; that that street is 150 feet wide and extends along the lake shore from the north to the south line of the subdivision. Further—

“The court finds that said pretended deed of vacation is null and void and that it is of no effect whatsoever, for the reason that the purchasers of the lots aforesaid did not join therein, and that the said Lake avenue was not vacated and was in nowise affected by the said deed.

“The court finds that the title to the said strip of ground called Lake avenue was in no way affected by the execution and recording of the said paper called a deed of vacation.

“The court further finds that on the 25th day of October, A. D. 1877, the said Westfall and wife purported to convey to Samuel D. Ward, Receiver of the Merchants, Farmers and Mechanics Savings Bank, all their right, title and interest in and to said Westfall’s subdivision, but the court finds that no title or interest whatsoever in the said Lake avenue or the ground covered by it passed by the said deed to the said Ward.

“The court further finds that by a deed duly recorded the said Ward, Receiver, purported to convey to the City of Chicago for a street called Lake avenue the westerly eighty (80) feet of the entire length of said Lake avenue, but the court finds that the said deed had no effect whatsoever on the said Lake avenue and had no effect whatsoever to change it from a street one hundred and fifty feet wide.

“The court further finds that thereafter the said Samuel D. Ward, Receiver, by deed duly recorded purported to convey to one R. W. Bridge the easterly seventy (70) feet of the entire length of the said Lake avenue and that by mesne conveyance to the said easterly seventy feet was pretended to be conveyed in parcels to the said defendant, and cross-petitioner, Charles C. Heissen and others, but that the court finds that each and every of said deeds is null and void and that none of them in any way affects the said Lake avenue or changes it as a street one hundred and fifty feet wide.

“The court finds that the equities are with the defendant to the said amended and supplemental petition and to the said amended and supplemental cross-petition, the City of Chicago.”

An appeal was prayed and allowed, but has not been prosecuted, and cannot now be prosecuted. A writ of error will not avail as the testimony has not been preserved in the record.

It seems clear, therefore, that no question could arise to change the character of Lake avenue from a public to a private way.

Second. With reference to the ownership of the submerged portion of Lake avenue as it now stands, I think it clear that such ownership is in the City. A question exactly like this came before the Supreme Court in the *Ward* case, where a portion of Lake Park had been washed away or submerged, and in passing on the right of the City to reclaim such portion as was originally dedicated for park purposes, the Supreme Court said:

“Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the City has completely re-asserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof.”

I am clearly of the opinion, therefore, that the City has the undoubted right to restore the submerged portions of Lake avenue and erect barriers on its line so restored to prevent further inroads of the waters.

With reference to your suggestion concerning “Lot 188,” I would say that this lot is a myth and has no existence in law.

Third. With reference to the interest of the South Park Commissioners, I would say that by the Act of 1903, the State conveyed to the South Park Commissioners the submerged lands lying between Jackson Park and 79th street, but this does not deprive the City of its right to regain the street destroyed by storms.

In conclusion, I think there is nothing in the way of this improvement, if made in a proper manner. It would, perhaps, be a wise precaution to exercise care in building the dock work when points are reached where the land is found to exist outside of the 150-foot line and between that and the waters of the lake, so as not to cause such land to be washed away.

Yours very truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Method of Measuring Distance When Ordinance Prohibits Hospital Within 400 Feet of a School.

December 31, 1906.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

In compliance with an order passed by your honorable body on December 17, 1906, and appearing on page 2374 of the Council Proceedings of that date concerning the right of the Chicago Union Hospital to conduct a general hospital on Dayton street, I beg leave to submit the following:

The old building of the Chicago Union Hospital was erected on a plot of ground fronting on Wellington street, Dayton street and King place, but far enough toward the Wellington street side of same to be beyond the four hundred feet prescribed by ordinance which provides that,

“No hospital of any kind or description hereafter erected or established shall be erected or established within four hundred feet of property used for school purposes.”

During the present year the managers of this institution undertook to erect a new hospital on a part of the remaining

portion of said ground. This new hospital comes within the four hundred foot limit mentioned in the ordinance if the distance is measured "as the crow flies," although the distance by the nearest traveled route is greater.

This department has had occasion several times to pass on the question of whether in such cases the measurement should be by the nearest traveled route or in an air line and has consistently held that the air line measurement is the proper one. (See Vol. 2 of Opinions, pages 448 and 1004.) The opinions given on this point have been fortified with numerous authorities, among which are the following:

Jewel v. Stead, 6 Ell. & Bl. 350.

Lake v. Butler, 5 Ell. & Bl. 92.

Commonwealth v. Jones, 142 Mass. 573.

Butler v. State, 89 Ga. 821.

State v. Greenway, 92 Ia. 472.

It is contended that there is very respectable authority for holding otherwise, but upon a careful examination of such authorities it will be found in every case that where the distance is measured otherwise than in an air line, it is done so where a person is required to do an act which necessitates traveling, as for instance the serving of a subpoena or the taking of a deposition.

See

Jennings v. Menaugh, 118 Fed. 612.

Smith v. Ingraham (N. Y.), 7 Cow. 419.

Ex parte Beebees, Fed. Cas. 1220.

In re Foster, 44 Vt. 570.

Fost, Fed. Prac., Sec. 286.

I am, therefore, convinced that said measurements should be taken from the nearest point of the hospital to the nearest point of the property used for school purposes "as the crow flies." The proposed hospital, therefore, comes within the prohibition of the ordinance.

I am informed that at the time the work on the new hospital was commenced the managers of this hospital were given notice that the site of the new building could not be

used for a hospital. The matter was thereupon taken to the court, a temporary injunction secured and the work proceeded. Since then, however, upon full hearing before a master in chancery of the Circuit Court, the master decided that the City was justified in its position and that the building can not be used for a hospital in defiance of the ordinance in question. While the court has not yet confirmed the master's report, there seems to be little doubt of its doing so. It is contended that the ground was purchased before the passage of the ordinance in question, but it seems that no part of same was used for hospital purposes prior to such enactment. I, therefore, see no reason why this should affect the question in any way.

From the above it will appear that under the ordinances of the City no hospital can be maintained in the new building erected on the premises in question.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Assistant Corporation Counsel.

**Construction of Gasoline Lamps in Subways. Power
to City to Require Elevated Railroad Companies
to Maintain Lights in Subways.**

January 2, 1907.

EDWARD DIEDERICH, ESQ., Gas Inspector.

Dear Sir:

I have your verbal request of recent date for an opinion as to whether the City has the right to compel the New York Central & St. Louis Railroad Company to construct a gasoline lamp at grade on the north side of Eighty-second street and the Lake Shore and Fort Wayne Companies to construct gasoline lamps in their subways.

It is the duty of a railroad company to use ordinary care to keep their subways and crossings reasonably safe for travel and traffic. Although a railroad when operated in a street, under legislative permission, is not a nuisance *per se*, it may become such if it is operated so as to become dangerous to life and property, and such nuisance may be abated by the municipal authorities under the ordinary police power. Tiedeman on Mun. Corp, p. 306.

It has long been a rule of law that where corporations operate canals or railroads for their own use, and erect bridges which intersect streets and highways, they must do so in such a way as not to interfere with the public use of the street or render its use unnecessarily dangerous. The bridge should be constructed and maintained with a degree of care proportionate to the known or indicated dangers, although unusual. Tiedeman on Mun. Corp., 317.

I am, therefore, of the opinion that the City has the authority under its general police powers to compel railroad companies to place lamps or lights where it is necessary that they should be placed in order that the necessary safeguards may be provided for the safety of the public.

Yours respectfully,

EDWARD T. WADE,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Assistant Corporation Counsel.

Power of City to Require Exchange of Transfers Between Chicago Union Traction and Chicago City Railway Lines.

January 2, 1907.

HON. JOSEPH F. KOHOUT, Alderman, 34th Ward.

Dear Sir:

You have asked me for an opinion as to whether the City Council could compel the Chicago City Railway Com-

pany and the receivers of the Chicago Union Traction Company to accept transfers for a continuous ride from passengers who pay their fares to the Chicago General Railway Company and *vice versa*. You referred particularly to the two cases in the 199th Illinois Reports, both entitled *Chicago Union Traction Company v. City of Chicago*.

The court, in the above cases, did not go so far as to say that the City had the power to compel the issuance of universal transfers. The court did decide in one case that the City could compel a street car company to issue transfers at all connecting points on its own lines, and that no additional fare could be demanded for a continuous ride where an ordinance provided for such issuance of transfers; also that such regulation was reasonable, and not contrary to any constitutional provision or accrued contract rights. In the other case the court decided that where there were nominally two companies operating such lines, which were in fact under the control of the same parties, such apparent diversity of ownership could not be invoked in order to evade the provisions of an ordinance requiring the issuance of transfers for continuous rides on one system.

In my opinion, where the ownership of two systems is distinct, the City has no power to compel one system to accept transfers from the other system. It is of course within the power of the Council to enact a special ordinance providing for this exchange or acceptance of transfers, and, if the companies involved accept same, the City could enforce the contract. But if one of the companies declined to accept such an ordinance it could not be forced to do so. The only other way of reaching it would be by a general ordinance.

If the Council undertook to pass a general ordinance covering the issuance of transfers it would have to be framed so as to apply to all of a class. In other words, it would most likely be impossible to enact a general ordinance which would compel the issuance of transfers on the lines in question that did not also compel the issuance of transfers from the Chicago City Railway lines to the Chicago Union Traction lines or that did not compel transfers from the South

Chicago lines to the Chicago City Railway lines. If such an ordinance were passed you would be confronted both with the question of reasonableness, and with the question of constitutionality.

The reasonableness of the ordinance would be a question of fact, which would have to be decided on the showing made.

As to the constitutionality of such an ordinance, even if it should be held that it does not impair any contracts, it must be borne in mind that the municipality has no right to deprive a corporation of property without due process of law. To compel it, by general ordinance, to carry a passenger without compensation of any kind would undoubtedly be held a deprivation of property. The fact that such passenger paid a fare to another company would not alter the case, since the company which is compelled to accept the transfer receives no benefit from it.

My conclusion, therefore, is that such an ordinance as you propose would be invalid.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Assistant Corporation Counsel.

Power and Procedure to Acquire a Site and Build a New City Hall.

January 3, 1907.

TO THE HONORABLE, THE CITY COUNCIL OF CHICAGO.

Gentlemen:

In response to the request contained in your resolution of December 17, 1906, as follows:

“Resolved, That the Corporation Counsel be and he is hereby requested to submit to this City Council as early as January, 1907, a written opinion, setting forth

therein the legal obstacles, if such exist, which stand in the way of the City of Chicago's proceeding to erect a new city hall building upon the present site of the city hall of Chicago, without this city's first acquiring absolute title to the said site, providing funds for the erection of such building may be secured by revenue from increased taxation, by appropriation of this City Council, or by bond issue, should the latter be authorized by the Illinois Legislature."

I beg leave to submit, in behalf of the legal department, the following opinion for your consideration and guidance.

I find that the question under consideration was before the Supreme Court, an opinion rendered May 11, 1897, and reported in 167 Ill. 109 to 121, in a suit of ejectment brought by Cook County against the City of Chicago for the possession of the West one-half of Block Thirty-nine in the Original Town of Chicago, which are the premises now occupied by the present City Hall building. The City claimed the right to occupy and use under the Act of October 20, 1871, and the agreement between the County and City of August 19, 1872. The County claimed that under the Act of February 4, 1851, the County authorities were forbidden "to sell, mortgage, incumber or convey Block 39, or *any part thereof*"; that the Act of October 20, 1871, did not repeal, by implication or otherwise, the Act of February 4, 1851, and, hence, the contract of August 19, 1872, was *ultra vires* and void. After the ejectment suit was brought, the City began injunction proceedings against the County before Hon. Murray F. Tuley, judge, who decided in favor of the City. This decision, on appeal, was reversed, the Supreme Court holding: (1) That the contract was *ultra vires* and void; (2) If the contract was valid, such defense could be made in the ejectment suit. *Cook County v. Chicago*, 158 Ill. 524-530.

The ejectment suit then came up before Windes, judge, who decided for the City, and, on appeal, his decision was affirmed. (167 Ill. 109.)

The opinion is by Phillips, justice, and is quite exhaustive. I will call your attention to such parts and points

thereof, only, as essential to a proper comprehension of his reasons and conclusion.

Before and at the time of the passage of the Act of February 4, 1851, the County solely occupied the whole of Block 39

In 1853, a building was erected and paid for and occupied partly by the City and partly by the County. In 1860 the building was enlarged and each used *exclusively* separate parts of the same.

In 1868, the Board of Supervisors passed a resolution providing the City should be entitled to the west one-half of the existing court house on payment of \$50,000 and have the privilege to erect a building west of the court house, the Common Council accepted the offer, erected a \$400,000 structure and exclusively occupied it. This building was destroyed by the fire of October 9, 1871. October 20, 1871, the legislature passed an act, the proviso to Section 1 being as follows:

“That not less than one-fifth, nor to exceed one-third, of said sum so appropriated shall be received by said city, and be applied in reconstructing the bridges and public buildings, and structures destroyed by fire, upon the *original sites* thereof, as already provided by the common council.”

There was an emergency clause as follows:—“great conflagration in the City of Chicago the buildings, bridges and other public improvements have been totally destroyed,” etc. The action of the Common Council referred to, was the resolution of October 12, 1871, as follows:

“*Resolved*, That the board of public works be directed to confer with the board of supervisors, or a committee of said board of supervisors, in regard to erecting a public building on the court house square, jointly with the county, for all public officers.”

On the 19th day of August, 1872, the City and County entered into a contract, in which all former arrangements were merged, which is the one referred to in the preamble to your resolution.

In referring to the respective legislative acts of 1851 and 1871, the court say:

“The only construction to be given this act is, that it was required of the city that a certain part of this appropriation should be expended for the erection of buildings for its use on this block. This requirement was a recognition of the right to use the same. A recognition of that right was, in effect, a repeal of the Act of 1851. If the Act of 1851 prohibited the city from using this lot, the Act of 1871 required it to do so. There is such repugnancy between the two acts that the latter is, by implication, a repeal of the former as to the west half of block 39, and after its passage the county had a right to convey to the city that part of that block.”

In speaking of the contract of August 19, 1872, the court say:

“It was agreed that the city ‘should have the control and occupancy of the said west half of the block for the uses aforesaid without hindrance, henceforth and forever,’ with the further provision, however that if the city should cease to use the same the county should have the right to resume possession, and in such case the city should forfeit all its rights therein and the contract should be void. For the rights given under this agreement the city released a debt due to it from the county of about \$30,000, and conveyed to the county what were known as the ‘hospital lot’ and the ‘criminal court block’ both being very valuable pieces of real estate in the city. Soon after this contract was made the city and county authorities proceeded to erect the building or buildings now on this block, and under the provisions of this contract the west half of the building was constructed by the city at a cost of \$1,716,000. The effect of the Act of 1871 was to authorize that contract. By it the right to use the west half of this lot by the city forever was given. No right of recovery exists on the part of the county against the city.”

This decision stands, today, as the expression of the judgment of our Supreme Court, and seems to confer ample power and authority under the act and contract aforesaid upon the City to erect and occupy, for *municipal* purposes, a building upon the present site of the City Hall.

One matter, apparently overlooked by the Supreme Court in its opinion, is that part of Section 2 of the Act of February 4, 1851, which uses the words, "nor the Common Council of the City of Chicago." Take this expression in connection with the fact that the City had occupied a portion of the West one-half of said Block 39, with a small building as early as 1837, may not the legislature have concluded that the County had recognized the fact that it had not used and did not need to use, said West one-half but that the City had and did; and especially in view of the almost continued use by one and disuse by the other of *that* part since 1851?

Again, may not the legislature (of 1871) have also thought that the legislature of 1851 by forbidding the City of Chicago, in immediate connection with the Board of Supervisors and Cook County, from mortgaging or disposing of the property, have recognized that, in some manner, or by some means, recognizable in law or justice, the City had acquired a right to or interest in a part of said Block 39? If not, why the mention of the "Common Council of the City" in connection with the inhibition against encumbrance or alienation? I mention it as a probable or at least possible reason actuating the legislature in passing the Act of October 20, 1871.

If a verbal opinion has been rendered by this department, in relation to said premises, such opinion was upon a state of facts entirely at variance with those embraced in said resolution, and did not relate to a case where the *City* is to erect a building *with its own funds* for municipal purposes upon the premises in question; but was based upon the facts that private persons or a private association of persons was to erect a building and lease it to the City, which, of course, could not be done, until and unless such *persons* or *associations* should first acquire title from the County.

I have the honor to be,

Yours respectfully,

THOS. J. TULEY,

Approved: *Assistant Corporation Counsel.*

JAMES HAMILTON LEWIS,

Corporation Counsel.

Application of North Shore Electric Co. to Repair Poles—Right of City to Sell Surplus Electricity.

January 15, 1907.

HON. LINN H. YOUNG, Chairman, Committee on Gas, Oil & Electric Light.

Dear Sir:

We return herewith the proposed council order authorizing the Commissioner of Public Works and City Electrician to issue permits to the North Shore Electric Company to repair and place in safe condition its poles and wires now in service in Jefferson Park and Norwood Park, as shown on the plat attached thereto. This was submitted to this department with a request for an opinion as to whether this company has any right to maintain and operate its system at those places.

We have been utterly unable to find anything authorizing this company to conduct such a business at those places, and we have the admission of the company's representative that it has no authority to carry on its business there. We are therefore of the opinion that the order cannot be properly passed, and if passed, will be a nullity.

The Council itself is without power to pass such an order until there has been presented to it the consents of those persons owning more than one-half of the property fronting upon the streets or alleys proposed to be used. So far as our knowledge goes no such consents have been filed. Therefore, the Council is without power to act in the premises.

We have also been asked by your committee for an opinion upon the right of the City to sell to private consumers surplus electricity from its municipal lighting plant.

The Act of May 18, 1905, which is commonly supposed to authorize the City to sell surplus electricity provides, "that nothing in this act contained shall be construed as enlarging the powers now conferred by law upon said City to own, construct and acquire electric lighting plants, or as per-

mitting said City to sell electricity so long as the same is needed for light, heat and power for municipal purposes.”

We are of the opinion that under this statute the City can have no surplus electricity to sell until all its streets, alleys, and public grounds are so well lighted that there can be no complaint about insufficient lighting. If an isolated municipal lighting plant does now produce more electricity than it will ordinarily use, steps must be taken to enlarge the pole and wire system so that additional street lamps may be lighted from this station, and this process must be continued until the whole city is lighted.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Validity of Proposed Milk Ordinance.

January 15, 1907.

HON. WILLIAM E. DEVER, Chairman, Judiciary Committee.

Dear Sir:

I am requested by your Honorable committee to state the reasons upon which I based my opinion of December 5, 1906, with reference to the validity and constitutionality of a proposed ordinance amending Section 1128 of the Revised Municipal Code. In order that there may be no confusion as to the proposed ordinance I enclose herewith a draft of the same incorporating the amendments suggested in my letter of December 5, 1906.

No doubt questions have arisen in your mind as to the validity of the proposed ordinance on account of the case of *Harwick et al. v. The Walker Gordon Laboratory Company*, 205 Ill. 497. In that case the Supreme Court held an act to be unconstitutional which provided that the owners of cans,

tubs, * * * bottles, * * * etc., with his, her, its or their names, brands, designs, trade-marks, devices or other marks of ownership stamped, impressed, labeled, blown in or otherwise marked thereon, may register such names, etc., with the Secretary of State and with the clerk of the proper county, and made it unlawful for any person to sell, deal in or use in any manner such cans, tubs, * * * bottles, etc., without the written consent of the owner.

The Supreme Court held the act to be class legislation because it had no special reference to the public health, comfort or welfare and because it provided an unusual remedy to such owners to recover such property which was not conferred upon others similarly situated. In discussing the act the Supreme Court said: "There is no provision that the person who has purchased one of these receptacles without the written consent of the owner shall only put therein food products of as high a standard as those manufactured by the original owner." * * * "We have examined this statute in vain for the purpose of finding any evidence that it was intended to apply particularly to food products." * * * "It cannot be contended that the selling or using of any of these receptacles in the manner prohibited by the statute, viz., without the written consent of the owner, is in any manner more injurious to the public health, morals, safety or welfare than if the same things be done with the written consent of the owner."

The ordinance in question is wholly different. It has to do with the sale of milk, not bottles.

Some persons engaged in the sale of milk and cream have made good reputations for the quality of the milk and cream handled by them by using care in selection of the dairies from which they obtained such milk and cream, and by providing the most sanitary methods of handling the milk from the time it leaves the dairies until it is delivered to the consumer. The name of such person blown upon the milk bottle is an assurance of the quality of the milk and to prohibit the sale of milk in such bottles except by the person himself or some other person who has purchased the milk in bottles from such

person, prevents unscrupulous persons from taking advantage of a good name to sell a poor quality of milk. The effect of the ordinance is, therefore, to prevent fraud and deception, to provide a means of detection of persons selling milk under the standard of quality provided by the general ordinances, and to afford the public assurance of the quality or purity of the milk purchased by it. These are the reasons from which I drew my conclusion that the proposed ordinance is a police regulation and valid and constitutional.

Respectfully submitted,

LEE D. MATHIAS,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,

Corporation Counsel.

Construction of Ordinance Licensing Dealers in Fish.

Chicago, January 21, 1907.

HON. JOHN E. TRAEGER, City Collector.

Dear Sir:

Your inquiry to this department of 17th inst., in which you desire information as follows:

“In several instances parties have complied with the notification and have procured fish-monger’s license. If, under the circumstances, they are compelled to have a fish-monger’s license for the sale of fish as above noted, and in the event of their having taken out both licenses as above stated, would this department be justified, in compliance with a request from the Finance Committee, to report on claims of various parties for refund of monies paid for delicatessen licenses when they had also procured the license for the sale of fish.

“This department desires the information so that it may properly make a report to said committee on the various claims on file in this office, forwarded to us for information and report by said committee,”

has been referred to and carefully considered by me.

Opinions have previously been given by this department touching, though, perhaps, not fully covering the question by you propounded. Those opinions are dated July 11, 1905, and December 7, 1905.

One expression in your inquiry is somewhat ambiguous, that is to say "fish monger's license." There are two sections of Article 3 of the Revised Municipal Code of 1905 to which I desire to call your attention. Section 1407 relates exclusively to delicatessen stores while Section 1408 to poulterers and fish mongers. The former section refers to and includes "smoked, salted or dried meats, sausage and other like articles"; while Sections 1408 speaks of poultry alive and fish or shell fish. Section 1407 has, apparently, sought to define a delicatessen, and such definition must stand. Section 1408 evidently contemplates the dealing in fish and fowls not treated by any artificial process, but to fish as produced (fresh) from the rivers and lakes, oysters and clams.

If, therefore, in addition to the other smoked, salted or dried meats, etc., designated and specified in Section 1407, the dealer deals in the commodities specified in Section 1408, he shall, also, procure a license for the things specified in the latter section.

One section evidently refers to cured, the other to uncured commodities, neither of which includes the other. Therefore a license is required for each.

But the requirement of such license is subject to this limitation. Of course when I say "deals" in any of the commodities aforesaid, it must be construed as *chiefly*; that is to say as a *business*—not as an *incident*. To illustrate, a butcher or grocer may sell fish one day a week, or sometime two of certain weeks; yet, if this is not done as part of his chief or principal business, but as an incident thereto and accommodation to certain customers, no license is required for that part of the business.

I have tried in this opinion to draw the line of distinction for your future guidance, but it is not intended to be an excuse for a *dealer in fact*, or as a specialty, from taking

out a license simply because he does not principally or *exclusively* deal in such commodity.

I am,

Yours respectfully,

THOS. J. TULEY,

Assistant Corporation Counsel.

Approved:

WM. D. BARGE,

Assistant Corporation Counsel.

**Whether Judgment in Garnishment Proceedings
Against City Is Valid If City Does Not
Appear and Plead Its Exemption.**

February 18, 1907.

HON. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

I have your request of recent date for an opinion as to the liability of the City of Chicago in a garnishment proceeding in which Albert Muller, alias A. E. Albert, for the use of James Lyons, is the plaintiff.

It appears that the said Lyons had a claim against a man named Albert Muller for rent due; that he brought suit and obtained judgment against the said Muller in the sum of \$77; that thereupon he garnisheed the City of Chicago for the amount of the judgment, and counsel for Lyons demands recognition of the judgment on the ground that the money held by the City was not for wages or services, but was an award made by the City Council for damages which had been sustained by the said Muller by reason of an overflow of a sewer.

The contention of counsel is that the judgment is good, because the City of Chicago did not appear and submit to the liability, and that it thereby waived its exemption and became liable to the judgment of the court in the same manner as other corporations and private individuals.

It is further contended by counsel that the said judgment is a valid judgment because of the character of the indebtedness; in other words, because the money which was due the said Lyons was not for salary earned or money due for services rendered, or for the performance of a contract, but it was an award for damages inflicted by the City.

We cannot agree with either of these contentions. Our Supreme Court has consistently held that a municipal corporation is not liable to process of garnishment no matter what may be the character of its indebtedness. The Supreme Court, in the case of *Merwin v. City of Chicago*, 45 Ill. 133, discusses thoroughly the question whether municipal corporations in this state are liable to process of garnishment. On page 135 therein the court says:

“We understand, however, the counsel for the appellant to concede that money due municipal officers, agents or contractors is not liable to garnishment; but, it is insisted, if the city has been required to answer, the alleged indebtedness, in the present case, would not have fallen in either of these classes. *But, in our opinion, the city should not be subjected to this species of litigation no matter what may be the character of its indebtedness.* If we hold it *must answer* in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation.”

A similar view of this question was taken in the following cases:

Mayor of Baltimore v. Root, 8 Md. 102.

Chiaely v. Brewer, 7 Mass. 260.

Bulkley v. Eckert, 3 Barr, 368.

Burnham v. The City, 15 Wis. 194.

McDougal v. Board, 4 Minn. 184.

Hawthorn v. St. Louis, 11 Mo. 59.

The question here presented has been often before the American courts and although the decisions are not uniform in a large majority of the cases, it has been held the writ

would not lie. It has been held that it must be decided as a question of public policy, and therefore that a municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts.

In the year 1905 the legislature of the State of Illinois enacted a law providing for the garnishment of the salary and wages due certain municipal and other officers. This act was held to be unconstitutional by the Supreme Court, principally because of the inartificiality with which the act was drawn, and because its object was contrary to public policy.

We are unable to find any authority in this state to sustain counsel's contention that because the defendant did not appear to take advantage of its rights it made itself liable to the rendition of judgment, but, on the contrary, we are of the opinion that the case above cited is conclusive as to the non-liability of the City of Chicago in this matter.

Respectfully,

EDWARD T. WADE,

Assistant Corporation Counsel.

Approved:

WILLIAM D. BARGE,

Assistant Corporation Counsel.

Validity of Proposed Ordinance Regulating Cold Storage Warehouses.

February 19, 1907.

HON. WILLIAM E. DEVER, Chairman, Judiciary Committee.

Dear Sir:

In response to the verbal request of the clerk of your committee for an opinion of this department as to the validity of a proposed ordinance providing for the regulation of cold storage warehouses and storing rooms, recently drafted by me at the request of your committee, I submit the following opinion:

By Section 62 of Chapter 24, R. S., the City Council has among others, the following powers:

“Fiftieth—To regulate the sale of meats, poultry, butter, cheese, yard, vegetables, and all other provisions and to provide for place and manner of selling the same.”

“Sixty-sixth—To regulate the police of the City or Village and pass and enforce all necessary police ordinances.”

“Sixty-eighth—To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

“Eighty-fourth—To compel the owner of any grocery, cellar, soap or tallow chandlery, tannery, stable, pig sty, privy, sewer, or other unwholesome or nauseous house or place to cleanse, abate or remove the same and to regulate the location thereof.”

The proposed ordinance prevents any person or corporation from conducting the business of storing perishable food for others for rent, hire or reward or from keeping cold storage warehouse or storing room where perishable provisions are stored or preserved in frozen or a chilled state for the purpose of disposing of the same at wholesale except in such places as are in a sanitary condition and fit for the purpose intended. It is therefore an ordinance to “regulate the sale of meats, poultry, fish, butter, lard, cheese, vegetables and other provisions and to provide for place of selling the same.” It is also a “police” regulation, as by its term it is calculated “for the promotion of health” and “the suppression of disease.” And further, any person or corporation who conducts an unwholesome house or place is subjected to the revocation of his license and the consequent discontinuance or removal of his unwholesome business to some place outside the city limits. It is therefore my opinion that the City Council has the power to pass the proposed ordinance.

The only other objection which might be raised to it is that it might be unreasonable and unconstitutional on account of the claim that it unreasonably discriminates between persons similarly situated. The ordinance does not apply to retailers, but only to wholesalers and cold storage warehouses and storing rooms, who and which come within its terms. It is my opinion that this objection is without merit

because of the fact that wholesalers and cold storage warehouses and storing rooms mentioned in the proposed ordinance receive the provisions mentioned therein for the purpose of storage for an indefinite period of time awaiting a change in the market, or the future requirements of the retail grocer who buys from day to day to supply the immediate demand of his trade. The retail grocer does not come within the same class as those affected by the ordinance because he buys and sells from day to day and does not buy to store and preserve in order to meet some future demand. Such provisions as are covered by the proposed ordinance handled by the retailer seldom are in his custody and control long enough to spoil or become infected. There is, therefore, a sufficient reason for special legislation regulating the persons affected by the proposed ordinance, and it is therefore my opinion that it is not open to the objection stated.

For the purpose of furnishing some legal bibliography for those of your Honorable committee who may desire to make some research into the questions relating to cold storage, with a view of ascertaining the fact, that the element of time in which provisions are kept in cold storage is a very important one affecting their condition, I beg leave to submit the following points with the authorities sustaining them:

Eggs may be contaminated by the escape of ammonia in the building or by gases from fruit in adjoining corridors.

Hunter v. Baltimore Packing & Cold Storage Co.,
75 Minn. 408.

Cheese deteriorates from dampness and mold due to the melting and dropping of frost and ice on overhead pipes by reason of permitting temperature to rise.

Minnesota Butter & Cheese Co. v. St. Paul Cold Storage Warehouse Co., 75 Minn. 445.

A warehouse which was damp caused mold, mold would cause rot and mold and rot ruins chickens and squabs placed in cold storage.

Leidy v. Quaker City Cold Storage & Warehouse Co., 180 Pa. 323.

Too high temperature in cold storage warehouse causes apples to rot.

Wilson v. F. C. Linde Co., 62 N. Y. Supp. 69.

Improper ventilation in cold storage warehouse causes apples to rot.

Townsend v. Rich, 58 Minn. 559.

The odors of fruit spoil butter.

Hold & Ice Cold Storage Co. v. Arthur Jordan Co.,
57 N. E. (Ind.) 575.

Too low temperature spoils fruit.

Greenwich Warehouse Co. v. Maxfield, 28 N. Y.
Supp. 732.

Hard pine boards used in the construction of cold storage warehouses contaminates eggs.

Parker v. Union Ice & Salt Co., 59 Kan. 626.

Too high temperature in cold storage spoils eggs.

Sutherland v. Albany Cold Storage & Warehouse Co., 66 N. Y. Supp. 835.

Respectfully submitted,

LEE D. MATHIAS,

Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Obstructions in Alley by Carson, Pirie, Scott & Co. Buildings.

March 4, 1907.

HON. EDWARD F. DUNNE, Mayor.

Dear Sir:

Some time ago complaint was made to you by Mr. Fred J. How that an alley extending south from Madison street about 120 feet, and thence east to a point about 120 feet east

of State street was unlawfully obstructed by certain buildings and you directed this department to investigate and report.

Upon taking up the matter we find that about fifty years ago one Buckner S. Morris dedicated for use as a public alley, a strip of land 10 feet in width extending south from Madison street at a point about 73 feet east of State street to a point about 120 feet south of Madison street and running thence east to an alley extending south to Monroe street.

In 1898 Schlesinger & Mayer were in possession of the premises adjoining this alley as tenants, and as such tenants were occupying the building standing upon the premises.

On July 13, 1898, at the request of Levi Z. Leiter, who was then the owner of the premises, the City Council passed an ordinance vacating the alley in question upon conditions that it should not be deemed to have been vacated and should not be closed unless the east 14 feet of lot 10 and the east 5 feet of lots 7, 8 and 9, all in Buckner S. Morris' subdivision and the north one-quarter of lot 6 in block 2 "shall have first been duly and legally dedicated as and for a public alley, and until said newly dedicated alley shall have been opened free from obstruction and paved without expense to the City. in a manner to be approved by the commissioner of public works."

Soon after the passage of this ordinance, Schlesinger & Mayer who held a long term lease, erected a building entirely covering the old alley and extending east to the west line of the proposed new alley. The new alley has been opened from Madison street south to an intersection with the old alley, so that there is now a continuous thoroughfare from Madison street to Monroe street, part of it being 14 feet in width as required by this ordinance, and the balance 19 feet.

We find that this new alley is free from obstruction, but that south of the new alley Carson, Pirie, Scott & Company have unlawfully constructed a bulkhead or a shipping platform that projects into the alley some 4 or 5 feet, making an unwarranted and unauthorized interference with traffic.

Soon after the passage of the vacation ordinance mentioned, there was filed in the office of the recorder of deeds of Cook County, an instrument executed by Schlesinger & Mayer purporting to quitclaim to the City this 14-foot strip for a public alley. In our judgment this is wholly insufficient either to dedicate a new alley, or as a compliance with the vacation ordinance. It goes without saying that the tenant can not lawfully subdivide his landlord's property and dedicate any part or portion of it for a public highway; yet that is precisely what was undertaken in this case.

The effect of the whole transaction is this: The old alley that was lawfully dedicated and lawfully in use is covered by a very large building and the proposed new alley has never been created in a manner that will enable the City to hold it.

We would recommend that orders be given at once to Carson, Pirie, Scott & Company to remove the bulkhead or shipping platform from this alley, and to obtain from the owner of the fee a good and sufficient dedication of the proposed 14-foot alley, in order that the City's title thereto may be freed from danger.

Yours truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

JAMES HAMILTON LEWIS,
Corporation Counsel.

Frontage Consents Required for Permit to Construct Addition to Garage.

March 7, 1907.

HON. PETER BARTZEN, Commissioner of Buildings.

Dear Sir:

I take pleasure in submitting herewith an opinion as requested by you as to whether Mr. F. Ebann, who, in Novem-

ber, 1905, erected at number 6310 Woodlawn avenue, in a residence district, a garage 20 by 125 feet in dimension known as the "Woodlawn Auto. Station" without first having filed a petition signed by a majority of the frontage owners in the block on either side of the street, should, in order to procure a permit for an addition thereto 50 by 139.5 feet and fronting on the same street, be required to file with his application a petition showing the written consent of a majority of the property owners according to frontage on both sides of the street.

The following new section, dealing with the question of frontage consent, was added to the Municipal Code March 12, 1906:

"2377a. GARAGES TO BE LICENSED—FRONTAGE CONSENTS. No person or corporation shall keep, conduct or operate a garage in this city without first obtaining a license so to do in the manner hereinafter provided; and it shall not be lawful for any person or corporation to locate, build, construct or maintain on any lot fronting on any street in the city, in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, any building for a garage, without the written consent of a majority of the property owners according to frontage, on both sides of such street.

"Such written consent shall be obtained and filed with the Commissioner of Buildings before a permit is issued for the construction of any such building. Provided, that in determining whether two-thirds of the buildings on both sides of such street are used exclusively for residence purposes any building fronting upon another street and located upon a corner lot shall not be considered. And provided, further, that the word 'block' as used in this section shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets, one on either side of the lot on which said garage is to be located, built, constructed or maintained."

Prior to the adoption of this ordinance garages were for some purposes classed as livery stables, but owing to the fact that such structures were not specifically named in the section

requiring frontage consents for livery stables, some doubt was entertained as to the requirement of frontage consents for their erection or operation, and it was, perhaps, on account of this doubt that Mr. Ebann was not required to file such consent.

That such a requirement is a proper exercise of the power vested in the City Council has been clearly settled by the decisions of our Supreme Court, especially in the cases of *City of Chicago v. Stratton*, 162 Ill. 494; *Martin v. The People*, 186 Ill. 314; *Harrison v. The People*, 195 Ill. 466; *Theurer v. The People*, 211 Ill. 206.

As to whether such frontage consents are necessary for an addition to an already existing structure, I believe, has not been clearly decided.

As the reasoning which supports this kind of legislation is based upon the idea that it is "proper to consult the wishes and ascertain the needs of the residents of the block," there is ground for the belief that the law applies, since the residents might be willing that a structure of a certain size might be maintained but might not be willing that a larger one be erected.

The proposed addition in this case is a very large one—more than two and a half times the size of the original building.

"An addition or change to a building already erected which so changes the plan, structure, dimensions and general appearance of the building already erected that according to common understanding of men it would be called a new building or rebuilding" was held to fall within an ordinance forbidding the erection of wooden buildings on certain streets.

Delione v. Long Branch Commissioners, 25 Atl. 274; 55 N. J. L. 108. To the same effect is *Willis v. Boyd*, 39 S. E. (Ga.) 707.

If the proposed "addition" falls within the above definition of a new building, I presume there could be no question but that the frontage consents should be procured.

No question of discrimination or monopoly could arise here as the original owner and the builder are identical.

In view of the fact that the wishes of the residents were never consulted with regard to the location of this "Auto Station," when it would appear that it was the intent of the City Council that that should be done as evidenced by the former ordinances; also by the passage of the amended ordinance within such a short time after this permit was issued, the purpose of which was to remove all doubt on the question; and for the reasons above stated, I am of the opinion that the frontage consents should be filed with the application for a permit in this case.

Yours very truly,

JOSEPH J. THOMPSON,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Assistant Corporation Counsel.

(Note: The following opinions should have been included in the succeeding volume of opinions.)

**In re Application of Calumet Western Railway Co. to
Lay Tracks Nine Years After Date of
Ordinance Conferring Authority.**

July 2, 1907.

HON. JOHN J. HANBERG, Commissioner of Public Works.

Dear Sir:

Your communication requesting an opinion as to whether or not the Calumet Western Railway Company should be granted a permit to place its tracks across Kleinman avenue and 114th street, under authority of an ordinance passed July 6, 1899 (Council Proceedings, page 1031), has been transmitted to me for attention.

An examination of this ordinance shows that by its terms the Calumet Western Railway Company has the authority to "cross with necessary and convenient switch tracks intervening streets and alleys lying south of the east and west center line of Section 18 and north of the south line of Section 19 * * * for the purpose of reaching industries which may be located between its main tracks and the Calumet River, the construction of such switch tracks to be upon permit granted by the Commissioner of Public Works," etc.

Doubtless the section above quoted expresses the reason for the laying of the switch track in question, and this section of the ordinance grants broad powers, which apparently might be exercised at any time within the discretion of the railway company.

We are nevertheless of the opinion that, in the light of many judicial decisions controlling such questions, your department is not justified at this time in issuing the desired permit. The authority seems to be clear that it is incumbent on a railway company receiving from a municipality a franchise similar to the one involved in this matter to exercise the privileges granted within a reasonable time.

In the case of *R. R. Co. v. Woodruff*, 86 Ga. 94, a railroad company was authorized to connect its railroad with "such sidetracks, turnouts and sheds as may be necessary for the convenience of freight and passengers, yet the court held that it was plain that sidetracks, etc., which did not become necessary for the convenience of freights and passengers" until twenty or thirty years thereafter could not have been in legislative contemplation when the act was passed. "Much safer and more rational construction is that the powers conferred by the act are exhausted by their exercise and by the consequent connection of the railroads."

City of Chicago et al. v. Chicago Terminal Transfer R. R. Co., 121 App. p. 211, approves the case above cited in a matter involving the same question, and says, in its opinion: "The City Council gave by its ordinance permission to make crossings on a given route with 'one or more railroad tracks.' When the company chose to make them with 'one,' and not 'more,' that particular permission may reasonably be said to have been exhausted." This decision was subsequently affirmed by the Supreme Court.

Other authorities, which we need not cite, have borne out the same rule, and we are disposed to advise your department that the Calumet Western Railway Company, having made its election as to what switch tracks it should lay during the first few years of the life of its franchise, is now, in law, precluded from making any further election, since nine years cannot be said to be a reasonable time within which the company is obliged to carry out this particular section of its ordinance.

Respectfully submitted,

HOWARD W. HAYES,

Assistant Corporation Counsel.

Approved.

GEORGE W. MILLER,

First Assistant Corporation Counsel.

**In re Width of the Illinois Central Railroad Company's
Right of Way From a Point 325 Feet South
of 29th Street to 27th Street.**

August 6, 1907.

HON. M. J. DOHERTY, Superintendent of Streets.

Dear Sir :

Your communication to the Corporation Counsel, bearing date July 30, 1907, has been handed me for reply. In it, you state complaint has been made by Mr. C. Kinsman, 2940 Lake Park avenue, that "the Illinois Central Railroad Company has been filling in and laying track and building platform to make concrete slabs along their right-of-way between 27th and 29th streets" and quote from a report regarding same by Assistant Superintendent of Streets, R. W. Solon, wherein he suggests "there may be a question as to the right to build on this land as it appears to me to be outside of their right-of-way" and conclude with this inquiry: "Will you kindly advise me as to the width of the Illinois Central Railroad Company's right-of-way from a point 325 feet south of 29th street to 27th street, i. e., whether it is one hundred or two hundred feet in width?"

In answer thereto, I have to say complaints of the character made by Mr. Kinsman were not infrequent nor uncommon in the past but through very able and exhaustive opinions of the courts, to which opinions great publicity was given, much has been done to relieve and clear up the situation.

In passing upon your question, it seems to me appropriate to first inquire as to what, if any, is the legal right-of-way of the Illinois Central Railroad Company at the point or place in question?

By an act of Congress, September 20, 1850 (9th Stat., 466, C. 61), a right-of-way was granted the State of Illinois, not exceeding *one hundred feet in width* on each side of its length, through the public lands for the construction of a

railroad, etc., with a branch to Chicago, and the right to take the necessary material for its construction. To aid the construction of this railroad and branches the same act granted certain sections of land, definitely designated, to the State, with certain reservations not here pertinent or germane. The lands so granted were placed at the disposal of the Legislature of the State and certain rights reserved to the public and privileges to the general government. The Legislature of Illinois formally accepted this Congressional Act February 17, 1851.

Laws of 1851, pages 192-193.

A short time prior to the State's acceptance, the Illinois Central Railroad was incorporated with the powers, etc., with which corporations are generally invested and with the specific power necessary to acquire, hold, and convey real and personal estate essential to fully effect the purposes of the act. It was authorized to "survey, locate, construct and operate a railroad, with one or more tracks or lines of rails," designating between what points the main line should run and providing for its branches, among which latter was the one to Chicago. Section 3 of this, the company's charter, provided "that the company should have a right-of-way upon and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding *two hundred feet in width through its entire length, etc.*"

Section 3, Private Laws of Illinois, 1851, page 61.

But Section 8 of the charter provided that "nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

On June 14, 1852, the consent of the Common Council of the City of Chicago was given by the adoption of an ordinance wherein permission was granted the company to enter the City. By the terms and conditions of entry, the road was to enter at or near the intersection of the City's southern boundary of Lake Michigan, follow the shore line on or near the margin of the lake, run northerly to the southern bounds

of Lake-Park, now known as Grant Park, etc. From this last point to the northern line of Randolph street, the company was permitted to enter upon and use in perpetuity for its road and works necessary to protect its line from the lake, a width of 300 feet.

Section 7 of the charter provides for the erection and maintenance of a stone wall and specifies that the wall south of Lake-Park now Grant Park, among other things, shall be at such a distance outside of the tracks of the road as may be expedient.

This ordinance was accepted by the company and on March 28, 1853, an agreement, required by said ordinance, was entered into by and between the City and the said Illinois Central Railroad Company. It was by virtue of this ordinance that the Illinois Central Railroad Company located its tracks within the corporate limits of the City. After the construction of the tracks, a break-water was erected by the company east of its roadway and afterwards filled up the space between the breakwater and its tracks with earth and stone.

In a very able and an elaborate opinion of the Supreme Court of the United States in the case of the *Illinois Central Railroad Company v. Illinois, Chicago v. Illinois Central Railroad Company* and *Illinois v. Illinois Central Railroad Company*, speaking through Justice Field, the court, at page 444 of opinion, 146 U. S. Reports, uses this language:

“It is sufficient to say that when this suit was commenced (March 1, 1883), it (the Illinois Central Railroad Company), had reclaimed from the waters of the lake a tract TWO HUNDRED FEET IN WIDTH, for the WHOLE distance allowed for its entry within the City and constructed thereon the tracks needed for its railway, with the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated breakwater between its tracks on the east and the necessary works for the protection of the shore on the west.”

and again on the same page of the same opinion, they say:

“They were constructed under the authority of the law by the requirement of the City as a condition of its consent that the company might locate its road within its limits, etc.”

I am of the opinion, that the facts and the law herein given make it perfectly clear that the width of the Illinois Central Railroad Company's right-of-way at the point inquired of in your favor is TWO HUNDRED FEET.

Respectfully submitted,

GEO. M. BAGBY,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

INDEX.

ACETYLENE GAS —Not an explosive	270
ALDERMAN —Applications for permits to set poles	183
ALLEYS (see Streets and Alleys)	
AMMUNITION —Storing of	122
ANNEXATION OF TERRITORY —Status of pleasure driveway after annexation	79
APPEAL —Effect on subsequent violation of ordinance	184
APPLICATION	
Of Commonwealth Edison Co. to set poles	215
Of North Shore Electric Co. to place poles in Norwood Park...	145
To erect pier at 31st street	82
APPROACH TO SUBWAY —Duty of railroad to maintain	80
APPROPRIATIONS	
Of funds derived from bond issues	205
Use of sum appropriated for water merchandise for water meters	164
ASSESSMENTS —Interest on	240, 242
ASSIGNMENT of wages of City employe	44, 54
AUTOMOBILES	
License for cab stand	278
License required from person keeping for hire	297
BANKS —Affidavits furnished by City depositaries	35
BEER —Sale of from wagons	286
BILLBOARDS —Power of City to regulate	244
BONDS	
Appropriation of funds derived from	205
For exhibition of fireworks	41
For maintenance of vault under sidewalk	96
Payment of interest on past due coupons	294
Release of securities by changing contract	187
To protect City for new water certificates	269
Withdrawal of sureties from	176
BUILDINGS	
Alteration of frame building within fire limits	290
Erection of two tenement houses on one lot	213

Firescapes on hotels	272
Park buildings must comply with City ordinance	158
Remodeling of La Salle Theatre	5
Retroactive effect on department store in existence when ordinance was passed	199

CITY

Agreement with park as to fines collected	285
Assignment of wages of employe	44
Classification of businesses which may be licensed or taxed ..	255
Contract to print ordinances	73
Gift of fountain to	37
Liability for construction of water tunnel	275
Liability for jurors' fees	123
Liability for unlawful acts of police	201
Notice of sale of real estate	168
Plan for new City Hall	76, 320
Power to compel elevated railroad to light street under structure	306
Power to compel elevated railroads to maintain lights in subways	317
Power to compel elevated roads to install drip pans at crossings	220
Power to compel railroad to elevate or depress tracks	221
Power to compel theaters to employ City firemen	248
Power to license lime, cement, sand, gravel and lath businesses	196
Power to license peddler to purchase direct from producer	159
Power to refund illegal interest	240, 242
Power to regulate billboards	244
Power to regulate cold storage warehouse	332
Power to require exchange of transfers between surface lines ..	318
Property exempt from taxation	87
Property leased exempt from taxation	128
Reconveyance of land when contingency has occurred	190
Sale of electricity by City	325
Taxes due City from certain railroads	237

CITY COUNCIL

May not repeal ordinance by order	91
May remit fine before right of appeal expires	28
May settle claims but may not give away property	97
Power to vacate alley	64

CITY DEPOSITARIES—Affidavits	35
------------------------------------	----

CITY HALL

Plan for new City Hall	76, 320
Title to site	8

CIVIL SERVICE

Credit marks for temporary employees	139
Police operators not entitled to same privileges as patrolmen ..	143
Right of Corporation Council to appoint attorney	230
Status of Assistant Superintendent of Streets	165

CHICAGO SUBWAY CO.—Relations of City with	228
---	-----

CLAIMS

For damages from Municipal dump	161
For money paid under invalid ordinance	191
For violation of contract to maintain reduction plant	18

COLD STORAGE WAREHOUSE—Regulation of	332
--	-----

CONTEMPT OF COURT committed when spirit of injunction is violated	136
--	-----

CONTRACTS

To print City ordinances	73
To supply coal	131

CORPORATION COUNSEL—Right to appoint attorney for Civil Service Board	230
--	-----

DAMAGES (see Liability)

DETECTIVE AGENCIES—What constitutes	218
---	-----

DISTANCE—How measured	315
-----------------------------	-----

DIVISIBILITY of license fees	60
------------------------------------	----

DRAM SHOPS

Conducted in harbor	65
Construction of ordinance	27, 107
Frontage consents	22
Meaning of term "legal voters"	224
Renewal of license	107

DUMP—Damages arising from	159
---------------------------------	-----

ELECTRICITY

Application of North Shore Electric Co. to place poles in Nor- wood Park	145, 325
Operation of North Shore Electric Co. without authority from City	304
Sale of by City	325

ELEVATED ROADS

Lighting of street intersections	306
Lights in subways	317
Payment of one-third of bridge maintenance by C. & O. P. Elevated R. R. Co.	300
Permits for additional tracks	31
Permits for new tracks	36
Permits for use of deadening material	92
Power of City to compel installation of drip pans	220
Right to store cars on tracks	308

ENCROACHMENTS ON STREETS

Of Palmer House columns	116
Of U. S. mail chutes	117
On alley by Carson, Pirie Scott & Co.	335

EXEMPTION

Effect of not pleading exemption from garnishment	330
From taxation of property leased by City	128
Of City property from taxation	84
Of representation of foreign nation from procuring license for dog	93

EXPLOSIVES

Act does not apply to Acetylene Gas	270
Storing of	122

FEDERAL

Right of City to inspect Federal elevator	20
Right of City to remove mail boxes encroaching on streets ...	117

FEES

Collection of notarial fees by City employe	295
Divisibility of license fees	60, 127

FINES

Remission by City Council	28
Remission by Mayor	97

FIRE MARSHAL —Supervision over storing of ammunition and explosives	122
---	-----

FIREMEN —Power of City to compel theaters to employ	248
--	-----

FIRE ORDINANCES

Alteration of frame building within limits	290
As applied to moving pictures	141
Fire escapes on hotels	272

FIREWORKS —Power of Mayor to permit and fix bond	41
---	----

FISH—Ordinance regulating dealers in	328
FOUNTAIN—Gift of to City	37
FRANCHISE of Northwestern Gas Light and Coke Co.	111
FRONTAGE CONSENTS	
Dram shop ordinance	22
For addition to garage	337
For garages erected prior to passage of ordinance	273
Garage ordinance	298, 303
Protest against renewing	27
GAMBLING	
Injunction protecting boat used for gambling	136
On boat outside harbor	88
Request to U. S. District Attorney to make arrests for on Lake Michigan	288
Seizure of slot machine on boats	292
GARAGES	
Additional license for automobile kept on cab stand	278
Applicability of livery stable ordinance	185
Frontage consents for	298, 303
Frontage consent to construct addition	337
Frontage consents when erected prior to passage of ordinance	273
GARNISHMENT	
Effect of not pleading exemption	330
Of salaries of City employes under proposed statute	46
GIFT—Of Fountain to City	37
HARBOR	
Application to erect pier	82
Dram shop in	65
Seizure of slot machines on boats	292
HEALTH—Police power of employe of Health Department	172
HIGHWAYS (see Streets)	
HOSPITALS—Measuring of distance to schools	315
HOTELS—Violation of fire escape ordinance	272
INJUNCTION	
Contempt when spirit of injunction is violated	136
Liability of City for sinking of land caused by water tunnel, City being enjoined	281

ILLINOIS TUNNEL CO.

Adjustment of tax claims	309
Relations of City with	228

INSPECTION of Federal elevators	20
---------------------------------------	----

INTEREST

On assessment not divided into installments—refund of illegal interest	240, 242
Payment of on past due coupons	294

JURORS FEES—Liability of City for	123
---	-----

LIABILITY

City—For money paid under mistake of law	6, 191
For repairs to water meter	94
For condition of sidewalk under bond to maintain vault	96
Of City for construction of water tunnel	275
Of City for jurors' fees	123
Of City for operation of dump	161
Of City for sinking of land because of water tunnel, City being enjoined from interfering	281
Of City for unlawful acts of police	201

LICENSES (see Permits)

Businesses classified which City may license	255
Divisibility of fees	60, 127
Exemption of representative of foreign nation from procuring license for dog	93
For automobiles kept on cab stand	278
From person keeping automobiles for hire	297
Of dram shop located in harbor	65
Of lime, cement, sand, gravel and lath businesses	196
Protest against renewal of dram shop license	107
Refund for unused period	6
What licenses are transferable	56
When required for peddlers	55

LIVERY STABLES

As including a garage	185
Interpretation of ordinance	90

MAYOR

Power to make appointments during vacation and accept resignations to take effect in future	63
Power to permit fireworks and fix bond	41

Power to release prisoners and remit fine	28
Power to remit fines	97
MILK	
Sale of evaporated milk	238, 276
Validity of ordinance	326
MOVING PICTURES—Fire ordinances	141
NOTARIAL FEES—Collection of by City employe	295
NOTICE of sale of City real estate	168
OBSTRUCTION (see Encroachment)	
OFFICERS (see Public Officers)	
ORDER (see Ordinances)	
ORDINANCES	
Construction of lumber yard ordinance	196
Contract to print	73
May not be repealed by order	91
PARKS	
Agreement with City as to fines collected	285
Must comply with City building ordinance	158
PEDDLERS	
Curbstone flower peddlers	278
License—when required	55
Selling beer from wagons	286
Validity of ordinance allowing direct purchase from producer..	159
PERMIT (see Licenses)	
Application to erect pier	82
Permit for Federal elevator	20
To street railway for new rails	29
To elevated roads for additional tracks	31
To elevated roads for new tracks	36
To use deadening material on elevated road	92
To C. & N. W. Ry. Co. for elevated tracks	110
To set poles and string wires	183
PENSIONS—Right of widow whose husband committed suicide	154
PIER—Application to erect	82
PLAYGROUNDS	
Cannot be created by special assessment	121
Exclusion of incorrigible persons	194

PLEASURE DRIVEWAY	79, 180
POLICE	
Liability for unlawful acts	201
Operators not entitled to same privileges as patrolmen	143
POLICE POWER	
Of Health Department employe	172
Over dram shop in harbor	65
Over gambling on boat outside harbor	88
Over pleasure driveways	180
Right of City to inspect Federal elevators	20
Right of City to inspect Public Library elevators	21
Right of meat inspectors to enter premises	181
PROTEST	
Against renewal of frontage consents	27, 107
Publication of notice of sale of City real estate	168
PUBLIC LIBRARY—Right to inspect elevators	21
PUBLIC OFFICERS	
Garnishment of salaries—validity of proposed statute	46
Power of Mayor to appoint in vacation and to accept resigna- tions to take effect in future	63
Status of Assistant Superintendent of Streets	165
PULLMAN CO.—Adjustment of tax claims	309
RAILROADS	
Application of C. & N. W. Ry. Co. to construct elevated tracks	110
Application of P. C. C. and St. L. Ry. Co. to lay tracks after time granted by ordinance has expired	132
Duty to light grade and street crossings	153
Duty to maintain and repair subways and approaches	80
Power of City to compel to elevate or depress tracks	221
Right of Penn. R. R. temporarily to open wall during track elevation	134
Taxes due City from certain railroads	137
Walls enclosing right of way, and street	189
Width of I. C. R. R. Co. right of way	343
REDUCTION PLANT—Claim for violation of contract to main- tain	18
SALARIES	
Advance salary as an assignment of wages	54
Of Assistant Superintendent of Streets	165
Validity of statute to garnish salaries of City employes	46

SCHOOLS—Measuring distance of hospital from	315
SECOND HAND furniture dealers	184
SEWERS	
Lowering of by special assessment or general taxation	235
SIDEWALKS—Bond for maintenance of vault under	95
SPECIAL ASSESSMENTS	
For lowering sewers	235
For playgrounds	121
Interest on bonds	240, 242
Interest past due on bonds	294
STREET RAILWAYS	
Application to lay rails after franchise ordinance has expired ..	124
Application to lay tracks after time expired	341
Application to put in new rails	29, 129, 150
Application to put in rails after time has expired	42
Application to put in temporary rails	253
Exchange of transfers between	318
STREETS, ALLEYS AND HIGHWAYS (see Vacations)	
Bridges across	195
Change of highways as platted by Road Commisioners	170
Duty of railroad to light crossings	153
Encroachment in alley	335
Flower stands on sidewalk	278
Legal status of 79th street	53
Lighting of beneath elevated R. R. structures	306
Power of City Council to vacate alley	64
Removal of encroachments	116, 117
Status of Lake avenue	312
Status of pleasure driveway after annexation of territory	79
Status of 75th street and Lake avenue—maintenance of a stand	105
Title to alley between 67th and 68th streets and Parnell avenue	
and Wallace street	84
SUBWAYS—Duty of railroad to maintain	80
SURETIES	
Attempted withdrawal from bond	176
Release by changing contract	187
TAXATION	
Adjustment of claims with Ill. Tunnel Co. and Pullman Co. ...	309
Classification of businesses which City may tax	255

Due City from certain railroads	237
Enforcement of collection of taxes by City	301
Exemption of City property	87
Lowering of sewer by	235
THEATERS	
Power of City to compel employment of City fireman	248
Remodeling of La Salle Theater	5
TRACK ELEVATION	
Amendment to ordinance	207
Right of railroad to make opening in wall temporarily	134
UNITED STATES (see Federal)	
VACATION	
Attempted vacation of alley by abutting railroad	84
Of alley	64
Of highway without consent of all abutting owners	151, 174
When City failed to accept dedication	222
VOUCHERS	
Approval of in Engineering Bureau	173
WAGES —Assignment of by City employe	44
WATER CERTIFICATES LOST —Issuance of new	269
WATER METER	
Grouping of	233
Liability for repair	94
Purchase by money appropriated for water merchandise	164
WATER TUNNEL	
Damages for construction of	275
Damages when City is enjoined from interfering	278
WORDS AND PHRASES	
“Explosives”	270
“Legal Voters”	224